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ABSTRACT

This book is intended to be used as a reference for schools that seek to create drug free educational environments and to discourage all forms of substance abuse by students and personnel. The publication examines pertinent legal principles, including search and seizure, drug testing (for students, athletes, and employees), due process and discipline, handicap law, privacy issues, potential areas of liability, and collective bargaining. The appendices contain 13 sample policies corresponding to these areas of discussion. (SI)

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# NSBA COUNCIL OF SCHOOL ATTORNEYS

# Fighting Drugs in the Schools: A Legal Manual

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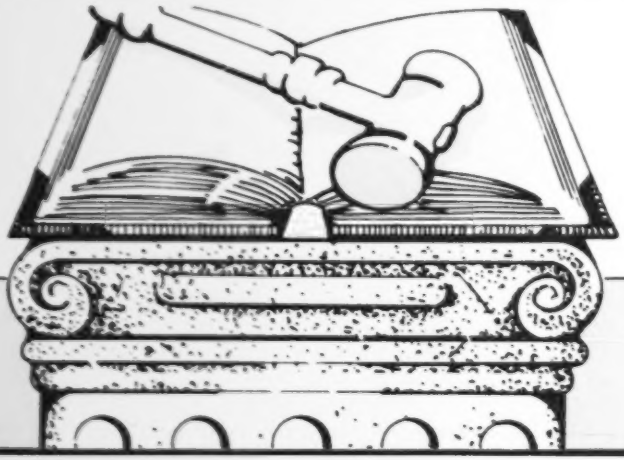

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## About NSBA. . . .

The National School Boards Association is a not-for-profit organization whose primary mission is the advancement of public education through the unique North American tradition of local citizen control of, and accountability for, the nation's public schools. Education policy is decided by local school board members who are directly accountable to the community. NSBA represents school boards' interests in Washington, D.C., before Congress and regulatory agencies, as well as state and federal courts.

NSBA promotes the quality of education through services to Federation Member state school board associations and local school districts. Federation members of NSBA include the 49 state school boards associations, the Hawaii State Board of Education and the boards of education in the District of Columbia, and the U.S. Virgin Islands. Founded in 1940, NSBA represents approximately 97,000 of the nation's school boards members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

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Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

More than 2,500 attorneys, representing local school districts of all sizes, find membership in NSBA's Council of School Attorneys essential for keeping abreast of school law issues and trends. Attorneys in twenty-seven states receive these benefits through membership in their state school attorneys' councils which have affiliated with the NSBA Council of School Attorneys. States with affiliated councils include: Alabama, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and West Virginia.

National School Boards Association
Council of School Attorneys

# FIGHTING DRUGS IN THE SCHOOLS: A LEGAL MANUAL

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# FOREWORD

NSBA's Council of School Attorneys presents *Fighting Drugs in the Schools: A Legal Manual* as a vital reference for schools that seek to create drug free educational environments and to discourage all forms of substance abuse by students and personnel. Schools that undertake this monumental but critical task must be aware of all the legal considerations that will control or affect their endeavor to conquer drugs.

This publication examines pertinent legal principles, including search and seizure, drug testing, due process and discipline, handicap law, privacy issues, potential areas of liability and collective bargaining. The appendices containing many sample policies corresponding to these areas of discussion will prove especially useful. Of course, there are important social and medical issues that accompany any battle against drugs; however, discussion of such topics are beyond the scope of this book's focus. *See Alcohol and Drugs in the Public Schools: Implications for School Leaders* (NSBA 1988).

This publication has been compiled and adapted from the work of several experienced Council of School Attorneys members. Contributing their effort and expertise to this manual were George Rogister, Richard Schwartz and Ann Majestic of Tharrington, Smith and Hargrove, Raleigh, North Carolina; Kelly Frels of Bracewell & Patterson, Houston, Texas; Edgar H. Bittle of Ahlers, Cooney, Dorweiler, Haynie, Smith and Albee, Des Moines, Iowa and Spencer Covert of Parker and Covert, Santa Ana, California.

The Council offers this publication with the expectation that it will respond to many of the needs and questions of school officials and school board attorneys who must ensure that any effort to eliminate the presence of drugs in public schools complies with applicable law.

David M. Pedersen
Chairman
Council of School Attorneys
September, 1988

# FIGHTING DRUGS IN THE SCHOOLS: A LEGAL MANUAL

## INTRODUCTION

Fighting the drug problem among America's young people is a responsibility that belongs to many, including our nation's public schools. As they attack the problem, schools can protect and prepare children with some powerful forces, including education and the opportunity to achieve and develop self esteem. While these weapons can assist in preventive and rehabilitative efforts, schools must also attempt to eradicate the drug and alcohol abuse problems that already exist among students and employees. This monograph will examine the legal constraints within which schools must conduct their battles against drugs. The tactics and strategies that a school could use on the social, educational and medical fronts of the war against drugs are discussed in another National School Boards Association publication, *Alcohol and Drugs in the Public Schools: Implications for School Leaders* (1988) (hereafter *Alcohol and Drugs*).

## SEARCH AND SEIZURE

In their efforts to detect drug possession, use or distribution, school officials may decide to carry out searches of persons, property or through drug testing. In all cases such searches must be conducted within the confines of the fourth amendment of the United States Constitution.

### *Historical Overview*

The fourth amendment protects: "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . ."[1] But what does the Constitution mean by "unreasonable?" The Supreme Court has answered this question by holding that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[2]

In the area of criminal law, this balance has been interpreted as requiring in the majority of instances that police obtain a warrant before conducting a search. Furthermore, the law requires that a warrant be issued only upon proof of probable cause to believe the items sought will be found in the place to be searched. The consequences for failing to



[1]U.S. Const., amend. IV.

[2]Camara v. Municipal Court of San Francisco, 387 U.S. 523, 536-37 (1967).

comply with these fourth amendment dictates include possible criminal[3] and civil liability[4] against the offending officer. In addition, the evidence obtained through the unlawful search may be held inadmissible at trial through operation of the exclusionary rule.

Search and seizure law as applied to the schools is grounded on the same basic principles as the law applied to police operations; however, the rules affecting the schools are decidedly more lenient. In fact, until recently there was some debate as to whether the fourth amendment applied to the schools at all. Fifteen years ago many courts held that school authorities were not government officials within the meaning of the fourth amendment.[5] Rather, school officials acted *in loco parentis* when they enforced school disciplinary rules, and as surrogate parents the officials were private persons not limited by the fourth amendment's proscription of unreasonable searches and seizures by governmental agents. Alternatively, in at least one case it was argued that a teacher was not serving as a government official when he conducted a search to maintain school discipline, because his chief responsibility was to educate children.[6] Moreover, the Alaska Court of Appeals in 1982 rendered the unique opinion that although school officials act under color of law in enforcing school discipline, they are not "law enforcement officers" and are not, therefore, bound by fourth amendment limitations.[7]

However, even before the Supreme Court's ruling in *New Jersey v. T.L.O.*,[8] courts had substantially repudiated the previously strict view of the *in loco parentis* doctrine, and cases excepting school officials from fourth amendment coverage had become rare. On the whole, courts recognized that school officials are government agents bound by the fourth amendment.[9] Furthermore, judicial decisions did not limit the scope of the fourth amendment coverage to principals and vice principals who are the primary disciplinarians in most schools. Today courts see any teacher who enforces school disciplinary rules as acting on behalf of the school board and therefore, as a government agent. As the Georgia Supreme Court aptly stated, "If an individual is possessed of state authority and purports to act under that authority, his action is state action."[10]

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[3]18 U.S.C. § 242 (1968).

[4]42 U.S.C. § 1983 (1981) or state tort law.

[5]*See, e.g.*, In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); People v. Stewart, 63 Misc.2d 601, 313 N.Y.S.2d 253 (1970); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

[6]L.L. v. Circuit Court of Washington County, 90 Wis.2d 585, 280 N.W.2d 343 (1979).

[7]D.R.C. v. State, 646 P.2d 252 (Alaska App. 1982).

[8]469 U.S. 325 (1985).

[9]*See, e.g.*, State v. Baccino, 282 A.2d 869 (Del. Super. 1971); State v. Mora, 307 So.2d 317 (La.), *vacated and remanded*, 423 U.S. 809 (1975), *original judgment affirmed at*, 330 So.2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976).

[10]State v. Young, 234 Ga. 488, 494, 216 S.E.2d 586, 591 (quoting Griffin v. Maryland, 378 U.S. 130, 135 (1964)), *cert. denied*, 423 U.S. 1039 (1975).

### *Reasonable Suspicion Standard*

On January 15, 1985, the United States Supreme Court, in the landmark decision *New Jersey v. T.L.O.*,[11] established the constitutional requirements for searches of individual students by school officials. As a threshold matter, the Court held that the fourth amendment's prohibition against unreasonable searches and seizures applies to searches of public school students by school officials. In accord with the majority of lower court opinions, the Court held that a school official may search a student based upon a "reasonable suspicion" that the search will uncover evidence of a violation of the law or of a school's rules.

Finding that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," the Court also held that the warrant and probable cause requirements traditionally applied to searches would not apply to searches by school authorities.[12]

In applying the fourth amendment to school searches, the Court adopted a two-pronged "reasonableness" test.[13] Under the first prong of this test, a student may be searched by a school official "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[14] In addition, the second prong requires that the "search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place."[15] For the scope of the search to be permissible, it must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[16]

The Supreme Court emphasized that searches based upon reasonable suspicion that are reasonable in scope may be conducted to detect even minor infractions of school rules. The majority opinion expressly rejected Justice Stevens' suggestion in his dissenting opinion that certain school rules are too "trivial" to justify a search.[17]

Recently, the Supreme Court ruled that the reasonable suspicion standard also applies to searches of public employees by their employers. *O'Connor v. Ortega*.[18] Justice O'Connor, writing for four members of the plurality which included Chief Justice Rehnquist, Justice White and Justice Powell, opined that two questions must be addressed in the context of a

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[11] 469 U.S. 325 (1985).

[12] *Id.* at 340.

[13] *Id.* at 341.

[14] *Id.* at 342.

[15] *Id.* at 341.

[16] *Id.* at 342.

[17] *Id.* at 342, n.9.

[18] 107 S.Ct. 1492 (1987).

public employer search: first, whether the employee's "expectation of privacy" was reasonable, and second, if so, what is the appropriate standard for the search.[19] As to the latter issue, the plurality held that "special needs" of public employers make the probable cause requirement "impracticable . . . for work-related, noninvestigatory intrusions as well as investigations of work-related misconduct."[20] In determining "reasonableness" the Court directed lower courts to follow the standard established in *New Jersey v. T.L.O.*, which looks first to whether the search was "justified at its inception" and second, whether it was "reasonably related in scope to the circumstances which justified the interference in the first place."[21]

Justice Scalia, although concurring in the decision to remand, disagreed as to the standard to assess the employee's expectation of privacy. In his opinion, the analysis of the plurality is flawed because its decision as to whether the fourth amendment applies *at all* depends on whether the searcher is a supervisor or a law enforcement officer. Justice Scalia, agreeing with the dissenters, would hold that "the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter."[22] As to whether the search is "reasonable," Justice Scalia apparently agreed with the plurality and would uphold searches for "work-related materials or to investigate violations of workplace rules."[23]

The dissenters challenged the plurality's standard for determining "reasonableness" as so broad as to make reasonable every workplace search by a public employer. Justice Blackmun, writing for the dissenters which included Justices Brennan, Marshall and Stevens, disagreed with the plurality's assumption that there is a presumed "special need" to forego the probable cause and warrant requirements. He distinguished *New Jersey v. T.L.O.* where the discipline of students gave rise to a "special need" to dispense with the warrant requirement in order to ensure "the safety of schoolchildren and teachers or the educational process itself."[24] The dissent conceded the important interests of public employers in assuring competence and efficiency of their workers as well as the fact that employees' privacy interests in the workplace are less than in other locales; nevertheless, the dissent questioned the conclusion that the "balancing of these interests *necessarily* leads to the standard borrowed from *New Jersey v. T.L.O.*."[25]

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[19] *Id.* at 1497.

[20] *Id.* at 1502.

[21] *T.L.O.*, 469 U.S. at 341.

[22] *O'Connor*, 107 S.Ct. at 1505 (Scalia, J., concurring).

[23] *Id.* at 1506 (Scalia, J., concurring).

[24] *Id.* at 1511 (Blackmun, J., dissenting).

[25] *Id.* at 1513-14 (Blackmun, J., dissenting).

The dissent expressed concern that the standard of the plurality opinion developed "in the abstract" and "ignoring the specific facts" might be used as precedent in other situations involving public employee searches; a footnote cited drug and alcohol testing of employees as an example.[26] However, Justice O'Connor carefully pointed out, also in a footnote, that the decision does not "address the proper Fourth Amendment analysis for drug and alcohol testing of employees."[27]

The plurality cautioned that the standard for a workplace search may not necessarily apply to closed personal luggage, a handbag or briefcase brought to the office. But as to desks, closets and open areas in classrooms, faculty lounges and offices, it would appear that school district officials have fairly extensive authority to search if they have a reasonable suspicion that an employee has violated a school rule or for the purpose of locating a school file or other work-related material.

### *Interpretations of the Reasonable Suspicion Standard*

In *T.L.O.* the Supreme Court indicates only generally what constitutes "reasonable suspicion." The Court refers to the necessity of a "sufficient probability" of uncovering evidence of an offense, but fails to quantify more precisely the degree of probability required to justify a search. The Court provides some guidance on this issue, however. It is clear that this standard requires less than "probable cause" but more than a "hunch."[28] In addition, the Court notes that reasonable suspicion may be based upon " 'common sense conclusion[s] about human behavior' upon which practical people—including government officials—are entitled to rely."[29] Further, the tenor of the opinion indicates that school officials should be granted some deference in making the difficult decisions involved in maintaining order in the public schools. The Court states that it would be inappropriate to impose a "crabbed notion of reasonableness."[30]

*T.L.O.* is the only Supreme Court case to discuss reasonable suspicion in the public school setting. However, several Supreme Court cases discuss the "reasonable suspicion" standard in the context of criminal law enforcement. Although these cases generally fail to elaborate on the abstract requirements of the "reasonable suspicion" standard, the facts of these cases provide some guidance as to what constitutes reasonable suspicion.

The reasonable suspicion standard was first crafted by the Supreme Court in *Terry v. Ohio*,[31] a case repeatedly cited with approval in the *T.L.O.* decision. In *Terry* the Supreme Court held that a police officer may "stop

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[26] *Id.* at 1514, n. 15 (Blackmun, J., dissenting).

[27] *Id.* at 1504, n. **.

[28] *T.L.O.*, 469 U.S. at 346.

[29] *Id.*

[30] *Id.* at 343.

[31] 392 U.S. 1 (1968).

and frisk" an individual without the probable cause necessary for an arrest if the officer has a reasonable suspicion that the individual is involved in criminal activity and may be armed and dangerous. The reasonable suspicion standard was satisfied in *Terry* because the officer had observed the two suspects repeatedly taking turns "casing" a store for a robbery by slowly walking past it and then conferring on a street corner.

In formulating the reasonable suspicion standard, the Court in *Terry* stated that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[32] Thus, a reasonable suspicion must be based on facts, but the officer is entitled to draw reasonable inferences from the facts in reaching the decision to stop and frisk. The Court also held that the reasonable suspicion standard is an objective standard. The subjective good faith of the officer is not sufficient.[33] The issue is whether a reasonably prudent person in the circumstances "would be warranted in the belief that his safety or that of others was in danger."[34]

The Supreme Court has decided a series of "stop and frisk cases" in the aftermath of *Terry v. Ohio*.[35] Although none of these Supreme Court "stop and frisk" cases concerns searches in the public schools, some of the factors articulated by the Court may be applicable to the school setting. Applying these cases, the following facts may, in various combinations, support a finding of reasonable suspicion to justify the search of a particular student: highly unusual conduct consistent with the hypothesis that the student is engaged in unauthorized activity; furtive, evasive or hostile conduct; a bulge in the student's clothing which may indicate the possession of contraband; tips supplied by reliable informers, past incidents involving the suspected student; and coincidences in time between the suspected student's location and a particular known unauthorized activity.

Indeed, prior to the *T.L.O.* decision, courts considered these factors in determining whether school officials had conducted valid searches. For example, the 1975 New York Supreme Court decision in *People v. Singletary*[36] closely parallels the analysis in *Terry v. Ohio*. In *Singletary*, the dean responsible for security in a New York City high school received a tip from a student that another student was selling narcotics on the school premises. The record revealed that the student informer had successfully identified drug offenders on five previous occasions. The dean

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[32] *Id.* at 21.

[33] *Id.* at 21-22.

[34] *Id.* at 27.

[35] *See* United States v. Cortez, 449 U.S. 411 (1981); Ybarra v. Illinois, 444 U.S. 85 (1979); Pennsylvania v. Mims, 434 U.S. 106 (1977); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968).

[36] 37 N.Y.2d 311, 333 N.E.2d 369 (1975).

conducted a search of the suspected student and discovered thirteen glassine envelopes of heroin in one of the student's socks. Echoing the Supreme Court's language in *Terry*, the New York court upheld the search, finding that the school official "acted upon the basis of concrete, articulable facts" supplied by a reliable informant.[37]

A year earlier the same New York court found reasonable suspicion lacking where a student suspected of dealing drugs was observed making two very brief trips to the bathroom with another student in one hour and later having lunch with another student known to deal in drugs.[38] The school claimed to base its suspicion on a "confidential source" of undisclosed reliability. In the court's opinion, the school had not satisfied the requirements of the fourth amendment. The court concluded that the defendant's conduct was too equivocal and the nature of the information provided by the "confidential source" too imprecise to warrant a search. Consequently, the court vacated the student's conviction for possession of dangerous drugs.

Other states have also adopted a strict definition of reasonable suspicion. In the 1979 case of *L.L. v. Circuit Court of Washington County*,[39] the Wisconsin Court of Appeals in dicta stated that while the lesser reasonable suspicion standard should be applied to school search cases, there still must be an articulable basis for the search, the search must be related to removal of a dangerous or illegal substance, and the requisite suspicion must be derived from reliable information or personal observations.

In *Bilbrey v. Brown*[40] the Ninth Circuit Court of Appeals found that school officials did not have reasonable grounds to search elementary school students based on the school bus drivers' report that she had observed the two boys exchange "what appeared to be money" for objects she could not identify but suspected to be drugs. The driver had also stated that one of the students had boarded the bus with a paper sack that he hid under his arm and showed to other students after he got off the bus. The court regarded this information as insufficient grounds for a search even when considered together with the drug problem that existed at a district high school and with the fact that one of the student's older brother had been involved with drugs at the high school.

In a post-*T.L.O.* case, a federal district court in Michigan ruled that in order for a search to be reasonable at its inception, a condition necessary under the first prong of the *T.L.O.* criteria, a school district must be able to establish that the student's conduct creates a reasonable suspicion that a specific rule or law has been violated and that the search could reasonably be expected to produce evidence of that violation. The court in *Cales v. Howell Public Schools*[41] said the *T.L.O.* decision does not allow school

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[37] *Id.* at 311, 333 N.E.2d at 370.

[38] People v. D., 34 N.Y.2d 483, 315 N.E.2d 466 (1974).

[39] 90 Wis. 2d 585, 601, 280 N.W.2d 343, 351 (1979).

[40] 738 F.2d 1462 (9th Cir. 1984).

[41] 635 F.Supp. 454 (E.D. Mich. 1985).

officials to search a student because the student's behavior creates a reasonable suspicion that the student has violated *some* unidentified rule or law. The behavior must indicate violation of a particular rule or law rather than merely suggest that the student is "up to something."

State courts have likewise invalidated searches where school officials lacked sufficient information to provide a reasonable basis for a search. In a California case, the court held that school officials did not have a reasonable basis to search a student's calculator case based on the child's truancy from class, his attempt to hide the case and his demand for a warrant when approached to be searched. In *In re William G.*,[42] these actions did not provide sufficient justification for a search given that the school officials had no prior information linking the student to possession, use or sale of drugs or other contraband. An Arizona court similarly ruled that school officials had insufficient evidence to justify a search based on the student's presence in an area where students reportedly went to skip class, smoke cigarettes and use drugs. The school principal also suspected the student of being involved with drugs.[43]

### *Property Searches*

- **Relevance of Nature of Place Searched**

The Supreme Court has held that the fourth amendment protects a person when he has a reasonable expectation of privacy in a particular place. In the seminal case of *Katz v. United States*,[44] the Court found that one can reasonably expect to be free from government intrusion when placing a call in a public telephone booth and, therefore, unauthorized bugging of the premises constitutes an unlawful search. On the other hand, there can be no expectation of privacy when one speaks in a loud voice on a public street.

The Supreme Court in *T.L.O.* expressly left open the question whether students have a legitimate expectation of privacy in school storage spaces such as lockers and desks.[45] (*See* discussion of locker searches, *infra* at 9–13). The *T.L.O.* opinion also failed to address the issue of the inspection of student cars or surreptitious surveillance of students in particular areas.

### *Surveillance Not Constituting a Personal Search*

In *L.L. v. Circuit Court*[46] the Wisconsin Court of Appeals took the position that a student has a diminished expectation of privacy simply by being on school premises. The court reasoned that every student recognizes that his security depends upon the capacity of the school to main-

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[42] 40 Cal.3d 550, 221 Cal. Rptr. 118, 709 P.2d 1287 (1985).

[43] In re Appeal of Pima County Juvenile Action, 733 P.2d 316 (Ariz. App. 1987).

[44] 389 U.S. 347 (1967).

[45] *T.L.O.*, 469 U.S. at 337, n.5.

[46] 90 Wis.2d 585, 280 N.W.2d 343 (1979).

tain discipline and that "a certain amount of restraint upon the activities of the students . . . is assumed and expected by all students."[47]

This view of the student's reduced expectation of privacy recently was adopted by a Michigan federal district court, perhaps to the extreme, in *Stern v. New Haven Community Schools*.[48] In *Stern* school authorities had installed a two-way mirror in the boys' restroom. Using the mirror, an employee of the school observed the plaintiff buying marijuana from another student. The school suspended Stern for the balance of the semester and reported him to the police. Stern, claiming a violation of his fourth amendment rights, brought an action against the school under 42 U.S.C. § 1983.

As a preface to its ultimate decision, the court in *Stern* specifically noted that the surveillance was conducted by school personnel, not police, and that no criminal action had been taken against the student. Then, applying the familiar balancing test, the court concluded that the student's privacy interest was subordinate to the school's duty to maintain order and discipline and that under the circumstances no fourth amendment rights had been violated. The court found that the limited view of the boys' restroom did not invade any protected zone of privacy of the student. Acknowledging the school's and the community's legitimate interest in school discipline and the significant need to meet the problem of illegal drug use in the schools, the court stated:

> [W]hen [the] plaintiff's privacy interest is weighed against the defendants' duty to maintain order and discipline (so as to foster an educational environment) and to fulfill their responsibilities under the *in loco parentis* doctrine (so as to protect the health and welfare of plaintiff and all the students at New Haven High School), the facts herein neither support a Fourth Amendment violation nor present a case of a constitutional magnitude.[49]

### *Search of Student Lockers*

Students lockers frequently are the subject of school searches. Most courts have found that students have a diminished expectation of privacy in their lockers because the schools retain ultimate control over them.

According to established precedent, a search is always permissible if consent is voluntarily given by the individual whose person or property is subject to the search. Thus, if a student agrees to having his locker searched and if contraband is discovered, any later challenge of the search as being unreasonable will fail.

In the school context, there is an additional issue of whether the school authority can consent to a police search of a student's locker based on the school's joint control of the property. In *People v. Overton*,[50] the New York

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[47] *Id.* at 600, 280 N.W.2d at 351.

[48] 529 FSupp. 31 (E.D. Mich. 1981).

[49] *Id.* at 37.

[50] 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967), *vacated and remanded*, 393 U.S. 85 (1968), *original judgment aff'd*, 24 N.Y.2d 532, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

Court of Appeals implied that school authorities may consent to such a search. The school vice principal in *Overton* agreed to open a student's locker when police showed him a search warrant and told him they suspected the locker contained marijuana. It was later held that the search warrant was invalid. On remand from the United States Supreme Court, the New York court considered whether the vice principal's consent had been coerced. The vice principal had testified at trial that he would have inspected the locker regardless of who had reported that it contained an illegal substance. Based upon this testimony the court concluded the vice principal acted voluntarily in accordance with his official duties.

In a somewhat similar case, *State v. Stein*,[51] two police officers, who had no search warrant, asked a high school principal to open the locker of a student suspected of theft. With the student's consent, the principal opened the locker, and there the police found a key which led to the discovery of stolen property. While the case turned on the student's consent, in *dicta* the court suggested consent by the principal would have been sufficient. The court noted that the principal opened the student's locker "on his own judgment."[52] The court then added, "We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes."[53]

An exception to this dominant judicial view is the decision of the New Jersey Supreme Court in *State v. Engerud*,[54] a companion case to *T.L.O.* In this case, school authorities searched a student's locker, acting on an anonymous tip that the locker contained drugs and on a year-old rumor that the suspected student sold drugs at school. The search disclosed two plastic bags of methamphetamine and a package of marijuana rolling papers. Having completed the locker search, the vice principal confronted the student and asked him to empty his pockets. The pockets contained a small amount of marijuana and forty-five dollars in cash. The evidence was turned over to the police and the student was charged with unlawful possession of a controlled substance and intent to distribute.

The student attempted to suppress this evidence at trial, but his motion was denied. On appeal, the decision of the trial court was reversed. The New Jersey Supreme Court rejected the trial judge's view that the search was "responsible and diligent." Instead, applying the reasonable suspicion standard, the court found inadequate cause for the locker search. In the court's opinion, there was neither a reliable informer nor sufficient corroboration to support the search. Furthermore, the court held that the student retained an expectation of privacy in the contents of his locker in the absence of a school policy of regularly inspecting student lockers.[55]

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[51] 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970).

[52] *Id.* at 640, 456 P.2d at 3.

[53] *Id.*

[54] 94 N.J. 331, 462 A.2d 934 (1983), *rev'd on other grounds*, 105 S.Ct. 733 (1985).

[55] The *Engerud* case was not appealed, as the student died of injuries received in an ac-

All of the locker search cases discussed thus far have involved the search of individual lockers rather than a general examination of all school lockers. While no case has been found which addresses the issue directly, the cases cited indicate that schools will be permitted to conduct general inspections of lockers where the purpose is strictly to detect a health or safety problem or a violation of school rules. This type of inspection is comparable to the administrative search approved by the Supreme Court in *Camara v. Municipal Court of San Francisco*,[56] a case upholding a general search of a city dwelling for housing code violations.

Recent cases show that courts will accord school officials less discretion in conducting general searches of student lockers when the purpose of the search is to discover illegal substances. A general examination of cases involving the use of drug-detecting dogs to sniff student lockers illustrates this heightened judicial scrutiny.

In *Zamora v. Pomeroy*,[57] sniffer dogs searching for narcotics were walked from locker to locker. One of the dogs alerted to the locker of Vidal Zamora. His locker was opened and marijuana was found inside. Zamora brought suit to challenge the inspection of his locker without his permission and without a warrant and alternatively argued that it was unlawful to use sniffer dogs to discover the drugs.

Despite the involvement of the police as initiators of the investigation and as handlers of the dogs, the court upheld the search. The court considered the retention of control of the lockers by the school district to be crucial. It specifically noted that the school policy on lockers was published in the student handbook and that a copy was given to each student. The policy provided that student lockers remained under the jurisdiction of the school and that the school reserved the right to inspect all lockers at any time, notwithstanding the fact that the lockers were assigned to the individual students who assumed full responsibility for the security of their lockers. Given this published policy, the court concluded: "Inasmuch as the school district had assumed joint control of the locker, it cannot be successfully maintained that the school did not have a right to inspect it."[58]

Despite this strong language, the *Zamora* decision is ambiguous about the grounds necessary for searching a student's locker. Even though the use of the dog was part of a general investigation of the area surrounding all the lockers in *Zamora*, the court noted that no locker was

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cident. However, in light of this case and others, school authorities might be well-advised to adopt a policy establishing joint control of school lockers and the right to inspect them. *See also* In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973) in which a California appellate court also applied a fourth amendment "reasonableness" test to locker searches. Without addressing the issue of joint control, the court summarily found that there was adequate cause for the search based upon an uncorroborated tip by other students.

[56] 387 U.S. 523 (1967).

[57] 639 F.2d 662 (10th Cir. 1981).

[58] *Id.* at 670.

examined until after the dog alerted to it three times. Alluding to this multi-stage investigation, the court applied the "reasonable suspicion" standard to the administrative search of Zamora's locker and indicated that the search was legal "once the probability existed that there was contraband inside of the locker."[59] Although the court did not comment directly upon the legality of the use of the dogs, it can be inferred that the dog's alert provided a valid means of securing the requisite "reasonable suspicion" for the subsequent administrative search.

The only other case that has directly addressed the use of drug sniffing dogs as a precursor to a subsequent administrative search of school lockers, *Horton v. Goose Creek*,[60] likewise upheld the use of the dogs for this purpose. However, unlike the *Zamora* court, the federal appeals court in *Horton* posed the additional question of whether the dogs sniffing, in and of itself, constituted a search. If denominated a search, "reasonable suspicion" would be required to exist before the dogs could be used.

The court analyzed this threshold issue by considering whether the dog's sniffing offends reasonable expectations of privacy and whether the degree of intrusiveness could be tolerated in a free society. It noted that the majority of criminal courts had held that sniffing of *objects* was not a search, with only a Ninth Circuit opinion remaining in disagreement.[61] The court cited with approval the Fifth Circuit's decision in *U.S. v. Goldstein*[62] that no search occurred when a dog sniffed luggage in an airport.

The *Horton* court also found persuasive the doctrine of "public smell," which provides that there can be no expectation of privacy and thus no fourth amendment protection for aromas emanating from property or persons exposed to the public. It further concluded that the dog merely aided or enhanced the investigator's olfactory senses in the same way that a flashlight enhances sight.

Because it held that the dog sniffing was not a search, the court did not need to address the reasonableness of the use of the dogs to sniff lockers. However, it remanded the case for a finding on the reliability of the dogs and for a determination of whether the reaction of the dog, in and of itself, provided adequate cause for a subsequent administrative search of the lockers.

The Fifth Circuit's position in *Horton* has received indirect support from the United States Supreme Court. In *United States v. Place*[63] the Court reviewed the reasonableness of a police search of luggage in a mu-

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[59] *Id.*

[60] 690 F.2d 470 (5th Cir. 1982), *withdrawing opinion at* 677 F.2d 471 (5th Cir. 1982), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

[61] 690 F.2d at 476, *citing*, U.S. v. Beale, 674 F.2d 1327 (9th Cir. 1982) and U.S. v. Solis, 536 F.2d 880 (9th Cir. 1976).

[62] 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962 (1981).

[63] 462 U.S. 696 (1983).

nicipal airport. The search was preceded by a sniff and alert by a drug-detecting dog. The search, conducted ninety minutes after the defendant's luggage had been detained, uncovered a large quantity of cocaine. The defendant was indicted for possession with intent to distribute and sought to have the evidence of the cocaine excluded. The district court denied the defendant's motion and the Supreme Court reversed. The Court found that the seizure and the 90-minute detention of the luggage without probable cause violated the fourth amendment. However, the Court noted that the officials would not have violated the Constitution, had they subjected the luggage to the canine sniff before seizing it and detaining it for 90-minutes without informing the owner of its whereabouts. The Court held that a canine sniff is not a search where personal luggage is sniffed in a public place by a trained dog.

In summary, the *Zamora* and *Horton* decisions, bolstered by the Supreme Court's opinion in *United States v. Place*, indicate that drug-detecting dogs may be used in a school setting to sniff the areas surrounding lockers and that these activities do not constitute a search. However, these cases suggest that once the dog has pinpointed a particular locker, the opening of that locker and the examining of its contents by school officials *is* a search requiring "reasonable suspicion."

School authorities would be well-advised to avoid challenges to locker searches by adopting policies making student lockers subject to search and publishing these policies in the student handbook. (*See* Appendices A-D). This approach may quell *Engerud*-style arguments that students maintain an expectation of privacy in their lockers. It also should obviate the need to use drug-detecting dogs in an effort to establish reasonable suspicion. (Use of dogs in personal searches, *infra*, at 15–19).

### *Automobiles Parked on School Premises*

In accord with the Fifth Circuit's decision in *Horton*, a Florida court in *State v. D.T.W.*[64] held that no showing of cause is needed to justify patrolling student parking lots or inspecting the outside of cars. In this case, during a routine patrol, a teacher's aide discovered drug paraphernalia on the seat of a student's car. The car was opened and drugs were found. The court held that reasonable suspicion is necessary to search the *interior* of a car. However, the discovery of the drug paraphernalia in plain view through the car window supplied reasonable suspicion to search the interior of the car.

In contrast, a Texas federal court in *Jones v. Latexo Independent School District*[65] held that the use of sniffer dogs to smell the exterior of cars must be based on reasonable suspicion. The court in *Jones* refused to categorize the use of sniffer dogs as falling within the "plain view" doctrine which permits officials to seize contraband that they notice in open view during the course of their normal duties. The court analogized the use of

[64] 425 So.2d 1383 (Fla. App. 1983).

[65] 499 FSupp. 223 (E.D. Tex. 1980).

sniffer dogs to electronic surveillance, finding that both techniques do not merely enhance the power of human senses but detect things outside the range of human perception. In light of the Supreme Court *dicta* in *Place* that a sniff of an object in a public place is not a search, the continued vitality of the *Jones* requirement of reasonable suspicion for automobile sniffing by canines is doubtful. (*See* Appendices A, C, and D).

*Personal Searches*

The most controversial area in the law on search and seizure in the schools today is the law regarding search of the student's person. The typical case is one in which, either through personal observation or a tip from a student informant, a school official suspects that a particular student possesses an illegal substance. The student is taken to the principal's office, asked to empty his or her pocket or purse, and the contraband is discovered. Even though students have a reasonable expectation of privacy in their person, courts permit such limited searches where the school employee's suspicion is reasonable.

The focus of the controversy is not on such relatively benign cases, but on the increasing number of cases involving mass searches of large groups of students for the purpose of discovering stolen property or illegal drugs and drug paraphernalia. In *T.L.O.* the Supreme Court expressly noted that it was not deciding whether individualized suspicion is an essential element of the reasonableness standard for school searches. It indicated that individualized suspicion is not an "irreducible requirement" of the fourth amendment and that exceptions have to be made where:

> the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " (citation omitted)[66]

In *Kuehn v. Renton School District No. 403*,[67] a case decided days before *T.L.O.*, the Washington Supreme Court invalidated a mass search of students participating in an overnight school band trip. School officials had established a practice of requiring students to submit to a predeparture search of their luggage because two students had been caught with liquor in their hotel rooms on a previous trip. The student-plaintiff and his parents objected to the luggage search. The student arrived for the trip with a locked suitcase and a note from his mother stating that she had searched the bag and that it contained nothing illegal. Nonetheless, the student was not allowed to go on the band trip because of his refusal to submit to a search.

Applying a "reasonable belief" standard, the Washington court held that the school's search violated the fourth amendment because it was not

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[66] *T.L.O.*, 469 U.S. at 342, n. 68.

[67] 103 Wash.2d 594, 694 P.2d 1078 (1985).

supported by individualized suspicion. The court also noted that the fact that the trip was voluntary and the search was conducted by band booster parents did not make the search constitutional where the event was school-sponsored and the parents' participation was school-sanctioned.

The Sixth Circuit Court of Appeals reached a different conclusion regarding the need for individualized suspicion in *Webb v. McCollough*.[68] In *Webb* school officials supervising a voluntary band trip to Hawaii conducted a random search of students' hotel rooms based on a a general suspicion that students might have alcohol in their rooms. In this situation, the court, rather than applying the *T.L.O.* reasonableness standards, deemed individualized suspision unnecessary on the ground that school officials act *in loco parentis* when supervising students away on school trips where the likelihood of injury or misconduct by students is greater than on school premises.

One particularly egregious mass search case is *Bellnier v. Lund*,[69] a New York federal district court case that involved the disappearance of three dollars in a fifth grade classroom. In *Bellnier*, the patience of school officials apparently had worn thin since there had been previous instances in which students had lost money, lunches and other items in the same class. In an effort to find the money, teachers first inspected the children's coats, then instructed the students to empty their pockets and remove their shoes. When the money still had not been found, the teacher marched the children to their respective restrooms and conducted a strip search of every child. Based on the fourth amendment's prohibition against arbitrary invasions by government officials, the court held for the plaintiff in her § 1983 action against the school, finding the search invalid because the teachers failed to narrow their examination to specific suspect children.

While the court in *Bellnier* had no trouble invalidating the general search of fifth graders for lost money, it suggested in *dicta* that it might have reached a different result if the search had been aimed at discovering concealed drugs. The court indicated that the presence of drugs introduced a much greater risk and implied that the school officials might, under such circumstances, be warranted in conducting a general search. (*See* Appendices A, B, C).

### *Use of Drug-Detecting Dogs*

Several courts recently have explored the issue left unanswered by *Bellnier*—whether general seaches for illegal drugs are constitutional—and have reached different results. The first case, *Doe v. Renfrow*,[70] involved an Indiana school board that, in response to reports of drug abuse in its schools, authorized the use of drug-detecting dogs in a general

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[68] 828 F.2d 1151 (6th Cir. 1987).

[69] 438 FSupp. 47 (N.D.N.Y. 1977).

[70] 475 FSupp. 1012 (N.D. Ind. 1979), *aff'd*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

search of 2,780 junior and senior high school students. The search was conducted by police officers and trained dog handlers who agreed prior to the search that no criminal charges would result. The entire search lasted three hours. By the end, the dogs had "alerted" to fifty students. These students were asked to empty their pockets or purses. The dogs continued to alert to eleven of these students; of these eleven, five high school students were subjected to thorough, clothed body searches and four junior high girls were strip searched. None of the body searches disclosed evidence of drugs.

The plaintiff in the *Renfrow* case, a thirteen-year-old girl, was one of the junior high students who was strip searched following the dog's repeated alerting. Some time after the search, the reason for the canine's persistence became obvious—on the morning of the inspection, the plaintiff had been playing with her dog which was in heat. The plaintiff brought an action against school officials, the police chief and the dog's trainer for damages and declaratory relief. The federal district court dismissed the action against the police chief and the dog trainer, leaving only those who participated in the strip search as defendants.

In its decision affecting the school defendants, the court found that the general inspection of the school for drugs and the sniffing of each student by the dogs were reasonable in light of the school's *in loco parentis* responsibilities.

Relying on related criminal cases, the court upheld the sniffing by a trained narcotic detecting canine. It adopted the rationale that a "sniff" is not a search and that the dogs are merely an aid to school administrators in detecting the scent of marijuana. The court held that the same reasonableness test applied both to the search of objects and to the search of persons, and that the students did not have an expectation of privacy which would preclude a school administrator from using drug-detecting dogs to sniff the area around school desks. As the court stated: "a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting."[71]

The court in *Renfrow* acknowledged that in many of the criminal cases, the law enforcement officers possessed independent information or "tips" concerning the whereabouts of drugs later sniffed out by the dogs. However, it found that the extensive list of prior drug incidents in the school (thirteen within the twenty days before dogs were used), the evidence of students refusing to speak for fear of reprisals, and the frustration of the administration in dealing with the problem constituted independent evidence indicating drug abuse within the school which justified the searches conducted.

The court held that the use of dogs to detect drug possession generally was permissible even where there existed no basis to suspect any individual student. It found that school officials may rely on "general information" to justify use of the canines to detect narcotics. Hence, the

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[71] *Renfrow*, 475 ESupp. at 1022.

"independent evidence" and the "alert" by a reliable dog, in combination, sufficiently sustained the administrative search of the students' pockets and possessions. The court held only the "strip search" of students to be unreasonable on the theory that the dog's alert alone did not provide sufficient cause when the search involved so severe an intrusion.

The *Renfrow* case was appealed to the Seventh Circuit Court of Appeals which affirmed the lower court decision on all substantive points and remanded on the issue of damages. The case did not stop with one appeal, however. The plaintiff first sought a rehearing by the circuit court, and although the rehearing was denied, four of the judges dissented. One judge appeared to speak for all four in criticizing the decision to uphold the validity of a blanket search. His dissent was unyielding: "No doctrine of *in loco parentis* or diminished constitutional rights for children in a public school setting excuses this alarming invasion by police and school authorities of the constitutional rights of thousands of innocent children."[72] The judge further argued that the intrusive probings by the dogs unquestionably amounted to a search governed by fourth amendment protections.

*Doe v. Renfrow* was appealed to the Supreme Court in May of 1981. Again, the request to be heard was denied, but not without dissent.[73] Justice Brennan strongly objected to the "dragnet inspection" conducted in *Renfrow*. While recognizing the school's responsibility to maintain a "safe and healthful environment," he concluded that "[t]he problem of drug abuse in the schools is not to be solved by conducting schoolhouse raids on unsuspecting students absent particularized information regarding drug users or suppliers."[74] Justice Brennan agreed with the dissenters in the Seventh Circuit that the use of drug-detecting dogs did constitute a search. Furthermore, he argued that once the police became active participants in the drug raid, their actions and those of the school officials had to be judged by probable cause standards.

While *Renfrow* was being decided by the Seventh Circuit, a federal district court in Texas was considering the similar case of *Jones v. Latexo School District*.[75] Unlike the *Renfrow* case, the searches in *Jones* were conducted without the aid of the police, no strip searches were performed and the surveillance included sniffing the outside of all students cars. Also in contrast to *Renfrow*, the three plaintiffs in *Jones* were all found to have contraband or drug paraphernalia within their control. The students were suspended for three days and lost three points from their quarter grades for each day missed, causing one of the plaintiffs to fail his senior year.

The court in *Jones* agreed with the *Renfrow* dissenters, finding that school searches using dogs must be supported by individualized suspi-

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[72] *Renfrow*, 635 F.2d at 582.

[73] 451 U.S. 1022 (1981).

[74] *Id.* at 1022.

[75] 449 FSupp. 223 (E.D. Tex. 1980).

cion. Because the school system could not present evidence that any of the students were suspected in advance of possessing drugs or other contraband on school grounds, the court invalidated the challenged searches.

In 1982 the Fifth Circuit decided *Horton v. Goose Creek Independent School District*,[76] which synthesizes to a degree the determinations of the courts in *Renfrow* and *Jones*.[77] The *Horton* court followed the *Renfrow* analysis in holding that the use of canines to sniff the exteriors of lockers and automobiles was not a search, but did not extend the *Renfrow* rationale to the sniffing of students. Instead, the Fifth Circuit adopted the reasoning set forth in *Jones* that a sniff of students is a search that must be supported by individualized suspicion.

In *Horton*, the named plaintiffs were subjected to sniffing by trained dogs. Two of the students triggered alerts. School officials questioned one student, took her purse and searched it without her consent. The officials discovered no contraband. The other student was asked to empty his pockets, which he did. When nothing was found, the school officials searched his socks and lower pant legs but again found no contraband.

The students filed suit alleging that the actions of the school officials violated the fourth amendment prohibition against unreasonable searches and seizures and the fourteenth amendment prohibition of deprivations of liberty and property without due process.

The Fifth Circuit concluded that the sniffing of objects by dogs is not a search, but found the sniffing of students themselves to be a search worthy of fourth amendment protection. Under the theory that dogs merely enhance human perceptual abilities, the court concluded that the sniffing of lockers and cars was not a search. However, the court held that the sniffing of the students was a search because a student retains a reasonable expectation of privacy in his person that is violated by the dog's technique of intentional, close-proximity sniffing of each subject, putting its nose on the person as well as manifesting other signs of excitement in the case of alert.

Thus far the Supreme Court has declined to consider the validity of using drug-detecting dogs for "dragnet" searches in the schools. The issue was not presented in *New Jersey v. T.L.O.* and the Court previously denied *certiorari* in *Renfrow* and in *Horton*. School districts must, therefore, be guided by the disparate determinations of the courts in *Renfrow*, *Jones* and *Horton*. While *Renfrow* holds that the use of the canines is not a search and *Jones* holds to the contrary, *Horton* takes the position that the same dog, exhibiting the same characteristics may or may not be engaged in a search depending upon *what* is being sniffed. Given that the Supreme Court has decided that a canine sniff of luggage in an airport is *not*

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[76] 690 F.2d 470 (5th Cir. 1982), *withdrawing opinion at*, 677 F.2d 471 (5th Cir. 1982), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1027 (1983).

[77] *See* notes 70 and 75 *supra*.

a search,[78] and that no criminal court has held that canine searches may be extended to persons,[79] it appears the *Horton* analysis is the most consistent with prevailing judicial opinion.[80] (*See* Appendix C).

### *Strip Searches*

In addition to the mass search cases, "strip search" cases have received significant attention. These cases pose the question of whether some types of school searches cannot be justified even when grounded upon reasonable suspicion.

Although the Supreme Court's majority opinion in *T.L.O.* failed to address specifically the propriety of strip searches, the second prong of the reasonableness test enunciated by the Court provides some guidance on the permissibility of strip searches. The scope of the search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[81] In his dissenting opinion in *T.L.O.*, Justice Stevens interpreted this language as "obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses."[82] Thus, the Court's apparent view is that strip searches should be reserved for serious offenses in which it is reasonably likely that contraband has been concealed on the student's body. If this interpretation is widely adopted, it is likely that strip searches of elementary students rarely will be upheld, given the nature of the infractions they are likely to commit and the relative infrequency with which such students possess dangerous contraband.

Lower courts have condemned the use of strip searches by school officials when not based upon reasonable suspicion. In the *Renfrow* case, *supra*, the Seventh Circuit allowed a recovery of monetary damages when a student was strip searched without reasonable suspicion. This decision can only be read as categorically invalidating strip searches of school children. Leaving little room for doubt, the court declared:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous un-

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[78] U.S. v. Place, 462 U.S. 696 (1983).

[79] *Accord* U.S. v. Bronstein, 521 F.2d 459, 465 (2d Cir. 1975), (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918.

[80] *Jones*, a federal district court decision from within the Fifth Circuit, was not overruled by *Horton*, a later case decided by the Fifth Circuit. However, the continued vitality of the *Jones* holdings must be tempered greatly by the later circuit court decision in *Horton*.

[81] *T.L.O.*, 469 U.S. at 342.

[82] *Id.* at 381 (Stevens, J., concurring in part, dissenting in part).

der "settled indisputable principles of law." . . . *Wood v. Strickland* accords immunity to school officials who act in good faith *and within the bounds of reason*. We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles.[83]

In *M.M. v. Anker*,[84] the Court of Appeals for the Second Circuit affirmed a lower court decision that allowed a student to collect damages for the humiliation she suffered as a consequence of a strip search. Under the circumstances presented, the court found that the school lacked reasonable suspicion to conduct the search. The facts of *M.M.* demonstrate the more restrictive approach courts apply to the reasonable suspicion test in strip search cases. The student, who had a prior history of thefts at school, was found during a fire drill crouched behind a door with the purse of another student and several posters belonging to the school. The court rejected the school administrators' proffered justification that the strip search was necessary to determine whether the student had taken anything else, when the facts demonstrated that nothing else had been reported missing.

Having reached its decision, the court in *M.M.* went on to comment on the general propriety of strip searches. While not as damning as the Seventh Circuit in *Renfrow*, the court was by no means approving. The court proposed that a uniform standard of reasonableness for school searches may not be appropriate; that, as the intrusiveness of the search increases, the standard should approach the stricter probable cause requirement. Thus, while the Second Circuit would not advocate a complete ban on strip searches in schools, it would severely limit them. This sliding scale approach to the quantum of suspicion required for a strip search also was advocated in *Bilbry v. Brown*.[85]

Other courts have approved the use of strip searches in the schools when based upon reasonable suspicion. In *People v. Scott D.*[86] school officials searched a student suspected of drug possession and found glassine envelopes containing heroin in the student's wallet. They then conducted a strip search to check for additional drugs. After deciding that the search was invalid from the start for lack of reasonable suspicion, the court took the opportunity to comment on strip searches in general. In the court's view, if the grounds for the search had been adequate and drugs had been found in a preliminary search, a strip search would have been permissible to ensure the student was not hiding other drugs.[87]

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[83] *Renfrow*, 631 F.2d at 92-93.

[84] 607 F.2d 588 (2d Cir. 1979).

[85] *See* note 40, *supra*, and accompanying text.

[86] 34 N.Y.2d 483, 315 N.E.2d 466 (1974).

[87] *See also* Bellnier v. Lund, 438 FSupp. 47 (N.D.N.Y. 1977) (*dicta* that strip search would have been permissible if based upon reasonable suspicion).

In a more recent decision, *Rone v. Daviess County Board of Education*,[88] the Kentucky Court of Appeals, granting a motion for summary judgment by the school system, upheld the strip search of a high school student suspected of carrying drugs. The undisputed facts showed that three weeks before the search, Rone had given a prescription drug to two fellow students, causing one to feel dizzy and confused. In addition, the day before the search, Rone had given a small quantity of marijuana to two students on the school bus. The day of the search, Rone was questioned about the school bus incident and asked about his use of marijuana generally. He admitted to dispensing marijuana on the bus and to using it regularly himself. Upon these admissions, two male vice-principals asked Rone to lower his trousers and undershorts to determine if drugs or marijuana were concealed inside.

After reviewing these facts, the court of appeals concluded that the school search satisfied the reasonable suspicion standard, even though there was no direct evidence that the student was carrying drugs on the actual day of the search. In support of the school's position, the court noted: 1) the student voluntarily submitted to the strip search; 2) he never was touched offensively during the search; 3) the investigation was conducted without law enforcement officers present; and 4) no criminal charges were brought against the student subsequent to any of the drug related incidents. Contrary to the prevailing trend, the court relied on notions of *in loco parentis* and held that the school was empowered to formulate any rules necessary to promote the public good, "provided that such rules were neither arbitrary nor maliciously promulgated."[89]

In *Tarter v. Raybuck*,[90] the Sixth Circuit Court of Appeals stated in *dicta* that body cavity searches exceed the outer limits of reasonableness for school searches, even when the search is conducted to detect possession of "contraband in violation of school rules."[91] The facts of the case did not actually present such an extreme search. Tarter, a high school student suspected of possessing drugs, removed only his jacket, boots, and shirt at the direction of school authorities. He had been asked to remove his pants as well but refused to do so. The school search was then ended and the police were called. The court approved the search, finding that the school officials had reasonable suspicion. It did not address the issue of whether a more intrusive search short of a body cavity search, such as removal of the student's trousers, would have been justified. (*See* Appendices A and B).

### *Police Involvement*

The involvement of the police in school investigations is an important factor considered by the courts in judging the reasonableness of searches.

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[88] 655 S.W.2d 28 (Ky. App. 1983).

[89] *Id.* at 30.

[90] 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

[91] 742 F.2d at 982.

When the school initiates a search and the police are not involved until contraband has been seized, courts have little difficulty upholding the search under the reasonable suspicion standard.[92] In fact, some courts have upheld searches based upon reasonable suspicion even when police are involved if it appears that the purpose of the search is to enforce school disciplinary rules rather than to ferret out criminal evidence.[93]

Where the police use the fruits of school searches in criminal prosecutions, the lower courts are increasingly reluctant to validate the search unless based on probable cause. Thus, at one time, the courts applied the lesser reasonable suspicion standard to school-initiated searches conducted with police assistance, in effect bringing the police under the school's umbrella.[94] More recent cases have rejected this leniency, holding that such circumstances merit application of the stricter probable cause standard.[95] Given the Supreme Court's emphasis in *T.L.O.* on the need for less stringent search standards in the school environment, the ultimate resolution of this issue is open to debate. A strong argument can be made that the relaxed standard accorded to school officials recognizes their special role and their motivation to look out for the children's interests, rather than merely to detect evidence of crime.

*Picha v. Wielgos*[96] illustrates the stricter judicial scrutiny applied when police are involved in school searches. This Illinois case began when a principal received a telephone tip that three female students had marijuana on school premises. On instructions from the school superintendent, he summoned the police. After the police arrived, school personnel searched the girls. In finding the search illegal, the court recognized the school's legitimate interest in the safety of the defendants and other students whom they might influence, but cautioned, "[A]ll [the school] can do in furtherance of that interest is to locate and perhaps confiscate the drugs."[97] When the school took the additional step of calling the police, the purpose of the search was arguably expanded to discovering evidence of a crime, not merely to enforcing school rules. Under these circumstances, the court held the probable cause standard must be met.[98]

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[92]Tarter v. Raybuck, 556 FSupp. 625 (N.D. Ohio 1983), *aff'd in part, rev'd in part*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 US. 1051 (1985).

[93]Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981). *But see* Note, *Use of Drug-Detecting Dogs in Public High Schools*, 56 Ind. L.J. 321, 336 (1981).

[94]*See, e.g.*, In re C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); In re Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).

[95]Picha v. Wielgos, 410 FSupp. 1214 (N.D. Ill. 1976).

[96]*Id.*

[97]*Id.* at 1220-1221.

[98]*Accord* Doe v. Renfrow, 451 U.S. 1022; *denying certiorari*, 631 F.2d 91 (1981) (Brennan, J., dissenting opinion); Piazzola v. Watkins, 316 FSupp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971).

The view of the *Picha* court is not universally accepted. In *State v. McKinnon*[99] the police received an anonymous tip from an informant that certain students were selling amphetamines. The police conveyed the information to the school principal, who in turn conducted a search which produced the identified drugs. The students subsequently were convicted for possession of a controlled substance. Finding the search lawful since "the school official [had] reasonable grounds to believe the search [was] necessary in the aid of maintaining school discipline and order,"[100] the Washington Supreme Court upheld the conviction. To a claim that the police and the school principal acted jointly, the majority of the court responded that it found no evidence that the police chief directed or encouraged the principal to conduct a search. One of the court's brethren was not so easily convinced, however. In a biting dissent, the one justice argued that the school official "acted in conjunction with and as a agent of the police" and that under the circumstances the search should be governed by the probable cause standard.[101]

Among reported cases, the facts of *McKinnon* are rather unusual. In most of these cases the police have not directly enlisted the school's help to apprehend suspected criminals where they would not have sufficient grounds to do so on their own. Such a practice clearly subverts the Supreme Court requirement that police searches be based upon probable cause.

But police involvement in a search of student does not necessarily trigger application of the probable cause requirement. In *Cason v. Cook*[102] the Eighth Circuit ruled that the reasonable suspicion standards established in *New Jersey v. T.L.O.* applied to a search of a student by a school official acting in conjunction with a police liaison officer. Upholding the search, the court noted that the vice principal did not initiate the search at the behest of the police but acted upon the basis of two reports by students of stolen property and after her own investigation. The police officer's involvement was limited and occurred only after the vice principal discovered in plaintiff's purse a wallet matching the description of the one reported stolen.

Another issue related to police involvement in school searches is whether searches by security guards hired by a school system should be governed by the more stringent probable cause standard applicable to searches by law enforcement personnel. Based upon the limited case law reported, it appears courts will treat school security officers like other school officials and apply the reasonable suspicion standard. Thus, in *In*

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[99]88 Wash. 2d 75, 558 P.2d 781 (1977).

[100]*Id.* at 81, 558 P.2d at 784.

[101]*Id.* at 83, 558 P.2d at 785.

[102]810 F.2d 188 (6th Cir.), *cert. denied*, 107 S.Ct. 3217 (1987). *See also* People In Interest of P.E.A., 754 P.2d 382 (Colo. 1988)(search of student's car by principal and security officer upheld under reasonable suspicion standard although school initiated investigation based on information from police officer).

*re Robert B.*,[103] a search by a "security officer" was scrutinized under the reasonable suspicion standard even though he was specifically authorized by California law to prevent violations of the law and to ensure the safety of students and faculty.[104] (*See* Appendix B).

### *Undercover Police Operations in Schools*

Police involvement with a school's effort to create a drug free environment may take the form of an undercover operation in which police officers pose as students in order to expose drug-related activities. Such undercover probes require extremely careful planning and execution and raise many legal issues.[105]

First, an undercover operation should have a clear goal: is it aimed at drug use, drug sales, those who supply to students who sell drugs on campus, or at gathering information about drug activities in the school? A focus will assist in dealing consistently with the information gathered. In addition, if specific individuals are the target of the probe, legal issues such as entrapment can arise.

Close cooperation between school and law enforcement officials should begin with a determination of who is initiating the operation. Police must adhere to "probable cause" standards when conducting an investigation. If school officials initiate the procedure, the standard for searches and seizures generally is "reasonable suspicion."[106]

Financing school undercover operations can be a delicate business, since the success of a drug operation depends on as few people as possible knowing of its existence. Bringing the undercover operation budget up before a school board for a vote, therefore, can seriously jeopardize its success, because at that point all board members become aware of the plan. The importance of secrecy cannot be overemphasized, both for the success of the operation and to protect the safety of undercover agents. The need for secrecy in undercover operations has been judicially recognized. In *People v. Serafin*,[107] defendants were charged with criminal sale of dangerous drugs after an undercover investigation into the sale of drugs in the public high schools of Montgomery County, New York. The defendants challenged their convictions on due process grounds, arguing that the three and one-half month lapse between their offenses and arrests rendered it impossible for them to receive a fair trial. The court denied the defendants' motion to dismiss, holding that any prejudice they suffered from the delay in their prosecutions was outweighed by the

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[103] 172 Cal. App.3d 763, 218 Cal.Rptr. 337 (1985).

[104] *Accord* Speake v. Graham, 317 F.Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971) (search on college campus).

[105] The following discussion has been adapted from Appendix 12, *Alcohol and Drugs in the Public Schools: Implications for School Leaders* 57 (National School Boards Association, 1988) (hereinafter *Alcohol and Drugs*).

[106] *See* discussion *supra* at 22–24.

[107] 67 Misc.2d 193, 324 N.Y.S.2d 235 (1971).

need to protect the public welfare by preserving the secrecy of the undercover operation.

To ensure a successful outcome, the appropriate school policies must be in place well before the undercover work begins. A well-designed, carefully worded policy can preclude the possibility of due process challenges by arrested students that school polices were vague or not sufficient to put students on notice.[108] (*See* Appendices A–I).

The success of an undercover operation also depends heavily upon the proper selection and training of police undercover officers. The agents selected must be young enough to pass for high school students, and for this reason may be police cadets who can receive course credit for the experience. Secondly, school officials must have a hand in selecting the agents. School officials may request a list of prospective agents and participate in interviews of the candidates before finally selecting the agents. Agents should then receive careful training from police and police attorneys in undercover work—including how to simulate ingesting drugs—and in legal issues such as the laws of entrapment.

Agents should know well in advance what their specific duties are. Undercover agents can provide school officials with a variety of general information about drug use in the schools—including where students use or deal drugs—without trampling anybody's legal rights. But they must remember at all times that they are in a school setting and should act accordingly, in spite of the fact that they are undercover agents. Any undercover operation is probably best started at the beginning of the school year so that the agents can be enrolled as new students. Most drug-using students are extremely suspicious of the student who transfers in the middle of the year. In addition, the agents must be provided with a new identity and the appropriate previous school records to dupe guidance counselors and teachers.

School officials can assist agents by providing them with a means of positively identifying the student drug users and sellers, whom the agents may know only by nicknames. But perhaps most important for school officials, with respect to the undercover agents, is ensuring their safety during the operation by protecting their identity.

School undercover probes culminate in what police refer to as "the bust:" the rounding up and arrest of the student suspects. The day of the arrests is generally a hectic time, but school officials can make some advance preparations. For example, a list of school disciplinary charges against each student suspect should be prepared in close consultation with the school attorney. In addition, a list of parents' telephone numbers should be developed so they can be quickly contacted after the arrests.

In the arrest procedure itself, school officials are faced with a set of difficult choices: whether to arrest the suspects on or off school grounds, and during or after school. Arresting the students during school offers several advantages, including access to the student suspects and tremen-

[108] *See* discussion *infra* at 33–36.

dous visibility that can have an equally strong deterrent effect on other students. On the other hand, it may also be perceived as "storm-trooper" type tactics. The approach school officials decide on should be based upon the needs in the community.

Students who are suspected of involvement with drugs face both school disciplinary and criminal charges. The two types of charges must be treated separately, from the moment the students are confronted with their actions, so that one type of charge does not jeopardize the other.

If the arrest procedure takes place in school, the school disciplinary code should be enforced by suspension. Notification should take place before the arrest and outside the presence of arresting officers.

Police questioning and arrest of students can raise legal problems especially if it occurs on a school campus. If police questioning takes place in the principal's office, for example, it may be considered a "custodial interrogation," and any admission made by the student might not stand up under a court challenge because the students can argue he believed he was not free to leave. For example, this argument was raised in *In re Killitz*.[109] A junior high school student was called to the office by the principal where he was met by a uniformed police officer. In the presence of the principal, the police officer questioned the student about his suspected involvement in an out-of-school burglary. Neither the police officer nor the principal told the student that he was free to leave the principal's office. In this meeting and another the following day, the student made incriminating statements about the burglary. The student later sought to suppress the introduction of his statements in a juvenile court proceeding against him. The Court of Appeals of Oregon reversed the juvenile court's denial of this motion, finding that the police interrogation was "custodial" within the meaning of *Miranda* because the student was not free to leave during the interrogation, the student was a suspect in the burglary at the time of his questioning and the student could not be said to have gone voluntarily to the principal's office for questioning.

Earlier the Oregon court had approved a student interrogation in *In re Gage*.[110] There, a student was questioned by the principal about the disappearance of one thousand school lunch tickets. The principal chose to speak to the appellant based upon his conversations with other students. The student apparently admitted to stealing the tickets and appealed the court order making him a ward of the state on the grounds that his statements to the principal were inadmissible under *Miranda*. The Oregon court assumed *arguendo* that in-custody interrogations by a public school principal must be preceded by *Miranda* warnings, but concluded that the principal's questioning of the student did not amount to a criminal interrogation because "the matter was still in the investigative stage."

Some states require that the police advise juveniles before any questioning of their right to have their parent, an attorney or other adult pres-

[109] 59 Or. App. 720, 651 P.2d 1381 (1982).

[110] 49 Or. App. 599, 624 P.2d 1076 (1980).

ent when talking to the police. *See, e.g., Commonwealth v. Ritchey.*[111] (*See* Appendix F).

Parents should be notified as soon after the arrests as possible, via the telephone list drawn up in advance. A press conference also should be scheduled, at which a previously prepared statement can be read. The press conference is a means of providing the press with access to correct information, thus reducing the risk that they will obtain incomplete information from persons not famliar with the details of the probe. Whatever information is released by school officials, however, should be done in accordance with the terms of student confidentiality regulations. (*See* discussion of student privacy rights, *infra,* at 60). The police may be legally free to release the names of arrested students; the school district may not.

Following the day of arrests, school officials again must ensure that the criminal justice system does not impede the effectiveness of school disciplinary actions. For example, school disciplinary procedures invariably will involve suspensions, which must be preceded by hearings. (*See* discussion of student due process rights, *infra* at 32–40). In many hearings, the police officers' testimony is necessary. School officials should have a prior agreement with police officials to make the agents available.

Drug-using special education students present school officials with an entirely different set of rules, including the permissibility of suspension and whether there is a relationship between the alleged drug violation and the student's handicap.[112] (*See* Appendix G).

Once the undercover operation is concluded, perhaps the greatest question facing school officials is what to do with the students who have been arrested.[113]

## DRUG TESTING

Drug testing has recently received increased attention as a means to detect drug use among students and employees. Schools considering a drug testing program must be aware of the legal ramifications of urinalysis screening to identify drug users.

### *Students*

It is settled law that taking urine samples for the purpose of detecting drug use is a search and seizure within the meaning of the fourth amendment. Therefore, the two part *T.L.O.* test for reasonableness would most certainly apply to any drug test conducted on a student by a school. (*See* discussion *supra* at 3–5). In order to satisfy this test the school officials must have reasonable suspicion *before* administering the test that the student being tested is involved in drug use. The U.S. Supreme Court in

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[111] 283 Pa. Super. 212, 423 A.2d 1064 (1981).

[112] *See* discussion *infra* at 58–59.

[113] *See Alcohol and Drugs* at 13, 26-33 for a discussion of various options besides discipline through suspension or expulsion.

*T.L.O.* did not decide whether a school must have individualized suspicion before searching a student; however, at least one state supreme court ruled that school officials needed individualized suspicion with regard to each student participating in a high school band trip before they could authorize a search of the students' luggage for drugs and alcohol. The court characterized a search of all the students' luggage without particularized suspicion as an unauthorized, general exploratory search.[114]

Whether a general suspicion that drug use exists on a widespread basis among students will support a blanket drug testing program is still open to question. A school that chooses to administer drug tests will have stronger legal grounds if it can demonstrate before taking a urine sample that it has reasonable suspicion that each student subjected to the test has used drugs.

Urinalysis for drug detection purposes must also meet the second part of the *T.L.O.* reasonableness test, i.e., the school must show that the search is reasonably related to the circumstances which justified the search in the first place. In deciding the reasonableness of the test's scope, a court will balance the school's need to discover the information sought in the search, with the intrusion of the search upon the student's privacy. The search cannot be excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction. The more intrusive the search, the more compelling the circumstances must be in order for the search to be considered reasonable.

In general, courts have considered the collection of a urine sample to be a highly intrusive search. This means schools must be able to assert strong justifications in order to render a drug screening test of a student reasonable. One possible interest the school may use in support of conducting urinalysis tests is its obligation to maintain a safe and educationally productive environment. Whether courts will deem this obligation compelling enough to outweigh the invasion of the student's privacy remains to be seen.

At least two courts that have considered the validity of student drug testing programs have disapproved the use of urinalysis testing of students under the circumstances of those cases. A New Jersey court held that the school board could not lawfully require mass urinalysis testing of students as a part of a standard preadmission health examination. *Odenheim v. Carlstadt-East Rutherford Regional School District.*[115] The court rejected the school district's arguments that the testing posed little or no intrusion since the urine sample would be taken for a number of traditional medical tests besides drug detection and that no sanction would be imposed upon a student who tested positive. Despite the school district's asserted health and rehabilitative purposes, the court still found that the urinalysis testing violated the reasonable privacy expectations of school children. The court characterized the program as

[114] *Keubn v. Renton School District No. 403*, 103 Wash.2d 594, 694 P.2d 1078 (1985).

[115] 211 N.J.Super. 54, 510 A.2d 709 (N.J. Super. Ch. Div. 1985).

"an attempt to control student discipline under the guise of a medical procedure."[116]

The New Jersey court also ruled that requiring mass urinalysis testing was not reasonably related in scope to the circumstances initially justifying the interference; in this regard, the court looked at the past numbers and percentages of students referred to drug assistance counseling compared with the total student body. Although the court did not specifically state that individualized suspision would be necessary to justify the urinalysis, the court did criticize the school district's contention that individualized suspicion was not necessary because *all* students would be tested without any discretion on the part of school officials.

In the second case, *Anable v. Ford*,[117] an Arkansas federal district court also disapproved the use of urinalysis even though the school officials had reasonable grounds to believe that the particular students tested had recently possessed drugs. In *Anable* the court's invalidation of urinalysis testing of students was largely prompted by the concern that the urinalysis test used could not pinpoint the time when the test subject had consumed marijuana. Because the urinalysis test could yield a positive result for marijuana usage as long as three weeks prior to the test date, the court concluded that the test did not prove that the students were under the influence of drugs while at school. Given this lack of probitivity, the court found that a positive result produced by this urinalysis test did not provide an adequate basis for disciplining students. (*See* discussion of test reliability and chain of custody, *infra,* at 53–55).

The court stated that because urinalysis testing is such a physically intrusive procedure, there must be a "high probability" or "clear indication" that the test would disclose evidence of a violation of school rules or criminal conduct, in order to justify its use. In the court's view the "high probability" standard would be satisfied only if there were "overt manifestation of recent use."[118] However, by its next step in reasoning the court completely ruled out the use of urinalysis testing in the school setting, since any overt manifestation sufficient to justify the test would by itself justify imposition of disciplinary measures without the test.[119]

### *Student Athletes*

In the only reported case to date that has upheld a drug urinalysis program for public high school students, the testing requirements applied only to student athletes. *Schaill v. Tippecanoe County School Corp.*[120] After setting forth in detail a public high school's proposed plan to require student athletes to submit to random urinalysis testing for drug de-

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[116] 510 A.2d at 713.

[117] 653 FSupp. 22 (W.D. Ark. 1985), *modified by* 663 FSupp. 149.

[118] *Id.* at 41.

[119] *Id.*

[120] 679 FSupp. 833 (N.D. Ind. 1988).

tection purposes, the court ruled that the plan did not violate the fourth amendment. The court held that although mandatory urinalysis is a search under the fourth amendment, the school's program satisfied the *T.L.O.* two prong test for reasonableness of school searches. The urinalysis testing program was justified by the school's legitimate need to ensure drug-free athletes, and reasonably balanced the school's need against student privacy interests. The court pointed out that collection of urine specimens would not be observed, test results would be kept confidential and students would be given an opportunity to be heard when testing positive. The court also ruled that the testing program did not violate due process requirements since participation in inter-scholastic athletics is a privilege not a protected property or liberty interest. The court noted that the penalty system in the program would involve no academic or criminal repercussions and deprives students of eligibility to participate in sports programs only after repeated offenses.

At the higher education level, courts have not responded uniformly in assessing the validity of drug testing programs for college athletes. In *O'Halloran v. University of Washington*,[121] a federal district court denied a student athlete's motion for a preliminary injunction to allow her to compete in inter-collegiate cross country meets pending a decision on the merits of the NCAA drug testing program. The court based its denial on its finding that the university's and the NCAA's compelling interests in protecting student health and ensuring fair competition outweighed the student's privacy interests. A California state court reached a different conclusion and granted a preliminary injunction barring enforcement of an NCAA drug testing program for women divers until a decision on the merits.[122] In Massachusetts, a state court struck down a drug testing program for student athletes under a state civil rights law.[123]

### *Employees*

Among the many decisions regarding public employee drug testing programs, two relate specifically to public school personnel. In *Jones v. McKenzie*,[124] the District of Columbia Circuit Court of Appeals ruled that drug tests may be administered to school bus personnel as part of a routine, employment-related medical examination where there is a "clear nexus between the test and the employer's legitimate safety concern."[125] In this case, the court found that the government has a compelling interest in requiring school transportation employees responsible for supervising, attending and carrying handicapped children to submit to routine medical exam drug testing. The court also found that the EMIT test, a

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[121]679 ESupp. 997 (W.D. Wash. 1988).

[122]Hill v. National Collegiate Athletic Ass'n., No. 619209 (Cal. Super. Ct., Nov. 19, 1987).

[123]Bally v. Northeastern University, No. 87-1178, slip op. (Mass. Super. Ct. Nov. 30, 1987).

[124]833 E2d 335 (D.C. Cir. 1987).

[125]*Id.* at 336.

commonly used drug screening method, is not sufficiently sensitive to detect work-related drug use. (*See* discussion of test reliability, *infra*, at 53–55).

In *Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District*,[126] the New York Court of Appeals ruled that mandatory urinalysis for probationary teachers eligible for tenure is unconstitutional under state and federal law absent individualized suspicion. The court of appeals rejected the school district's argument that urinalysis testing does not constitute a search since the urine samples are obtained without invading the body and is a waste product in which there is no expectation of privacy. In the court's view requiring a person to urinate in the presence of a government official is as intrusive as a body search and implicates privacy interests even where the person is allowed to urinate in private at the command and with the supervision of a state designated person. Declaring that such a search must be based on reasonable individualized suspicion, the court flatly rejected the argument that the reasonable suspicion standard should be waived in cases of uniform testing.

Other courts reviewing the validity of public employee drug testing programs have similarly required that employers have reasonable individualized suspicion before subjecting an employee to urinalysis for drug detection purposes.[127] The Ninth Circuit recently invalidated regulations of the Federal Railroad Administration on the grounds that they violate the *T.L.O.* reasonableness standards because they permit searches without particularized suspicion.[128] The regulations mandated alcohol and drug testing of railway employees involved in certain major train accidents and fatal incidents. The United State Supreme Court has agreed to review the decision.

The High Court will also review a Fifth Circuit holding that approved mandatory drug testing of U.S. Customs Service employees who seek positions in the Service's drug enforcement program. *National Treasury Employees Union v. Von Raab*.[129] The Fifth Circuit upheld the plan based on the strong governmental interest in employing non-drug users in drug enforcement programs and the limited intrusiveness of the search.

The sensitive nature of the work or the need for public safety has motivated other courts to approve drug testing programs for certain groups of public employees. In *American Federation of Government Employees*

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[126] 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987).

[127] *E.g.*, Lovvorn v. Chattanooga, 647 FSupp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir., 1988); Capua v. City of Plainfield, 643 FSupp. 1507 (D.N.J. 1986); Palm Bay v. Bauman, 475 So.2d 1322 (Fla. App. 1985); King v. McMickens, 501 N.Y.S.2d 679 (App. Div. 1986); Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y. Sup. Ct. 1986).

[128] Railway Labor Executives Association v. Burnley, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S.Ct. 2033 (1988).

[129] 808 F.2d 1057 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988).

*AFL-CIO v. Dole*,[130] a federal district court upheld a U.S. Department of Transportation mandatory random drug testing program for certain employees in positions concerned with public health and safety. The court found the test reasonable in light of the dangers to the public health and safety and the safeguards provided employees under the plan.[131] Courts have also approved drug screening programs that do not require individualized suspicion for corrections employees[132] and police officers.[133] In a recent opinion from the Third Circuit, the court of appeals upheld random and annual physical drug testing of police officers based on the administrative search exception to the fourth amendment.[134] Citing *Shoemaker v. Handel*,[135] a case approving random urinalysis for jockeys, the court found that police officers are employed in a "highly regulated" profession that reduces their expectation of privacy. The court reasoned that the public has a greater interest in maintaining a drug-free police force than in assuring the integrity of the horse racing industry and found that the occupation of a police officer is "far more intensely regulated" than that of a jockey.

Hopefully, the Supreme Court's review of two cases involving drug testing of public employees will help clarify the appropriate balance between public safety concerns and individual privacy rights.

## DUE PROCESS AND DISCIPLINE

### *Students*

A school may choose to take disciplinary action against a student found to be involved with drugs. Although the school setting has been recognized by the courts as a special setting in which school officials are granted a broad range of powers in maintaining an orderly environment, the courts have also required that school officials adhere to constitutional standards and the requirements of due process.[136]

In recognizing that school officials have a broad range of authority to determine offenses and punishments, the courts have required that the rules and possible punishments be stated sufficiently for the student to understand what types of conduct could result in displinary action. The

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[130]670 FSupp. 445 (D.D.C. 1987).

[131]*See also* Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Allen v. City of Marietta, 601 FSupp. 482 (N.D. Ga. 1985).

[132]*E.g.*, McDonell v. Hunter, 612 FSupp. 1122, *aff'd in part, rev'd in part*, 809 F.2d 1302 (8th Cir. 1987); Seelig v. McMickens, No. 14285/86 (N.Y. Sup. Ct. July 29, 1986).

[133]*E.g.*, Police Benevolent Assoc., Local 318 v. Washington, 850 F.2d 133 (3d Cir., 1988); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985); Fraternal Order of Police v. City of Newark, Docket No. L-095001-85E (Essex County, N.J. Sup. Ct. 1986).

[134]*Police Benevolent Assoc., Local 318*, 850 F.2d 133 (3d Cir. 1988).

[135]795 F.2d 1136 (3d Cir. 1986).

[136]Goss v. Lopez, 419 U.S. 565 (1975).

rules do not have to be drawn with the specificity of criminal statutes, but they do need to be specific enough to inform the student of prohibited conduct.[137] It is the procedural aspect of the rules with which the courts have generally been the most concerned, not the substantive content. Unless the rules are arbitrary and capricious as a matter of law, or they are so vague that a reasonable person must guess at their meaning, the courts generally do not disturb the choices made by school officials. (*See* Appendices G and H).

One of the recurring school discipline issues is the extent of the school's jurisdiction over students. That is, to where does a school's jurisdiction extend and when does it apply? Clearly, a school district could not punish a student for drinking alcoholic beverages in the privacy of his or her home at night just prior to going to bed. Just as clearly, the school district can punish a student who drinks an alcoholic beverage while at school. What about the student, however, who goes off campus at the noon hour and purchases and consumes an alcoholic beverage at the corner drug store?

To maintain order on the school campus, the school administration must be able to regulate more than simply the activities which occur on the campus itself. While the law may vary with respect to different state statutes and regulations or circuit court decisions, a school district may generally enforce its disciplinary regulations with respect to those activities which affect the missions and operations of the school district or endanger the safety and welfare of students and employees. To be certain that students are aware that such off-campus activity may be subject to school discipline rules, a statement of jurisdiction should be included in school discipline policies. For example, the sample policies in Appendices E, G and H state:

> These policies and regulations apply to any student who is on school property, who is in attendance at school or at any school sponsored activity or whose conduct at any time or any place interferes with or obstructs the missions or operations of the school district or the safety or the welfare of students or employees.

This statement makes clear that student activity which may have an effect on the school may be punished. Such a statement of policy should help to clarify the extent of a school's jurisdiction.

These issues of defining the prohibited conduct and delimiting the school's scope of authority certainly apply in the context of disciplining students for drug and alcohol related offenses. The following cases demonstrate the importance of developing policies that clearly place students on notice of what behavior and substances are prohibited and the possible consequences of breaking the rules. (*See* Appendix E).

In *Wood v. Strickland*,[138] the United States Supreme Court upheld the school board's interpretation of a school rule prohibiting students from

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[137] *See* Bethel School District v. Fraser, 106 S.Ct. 3159 (1986).

[138] 420 U.S. 308 (1975).

using or possessing "intoxicating" beverages. The Court rejected the lower court's construction of the school rule which linked the definition of "intoxicating" to a state statute restricting the term to beverages with more than 5% alcohol by weight. Although the Court recognized that public high school students have substantive and procedural rights while at school, it also affirmed the discretion and judgment accorded school administrators and school board members in construing school regulations.

Two related cases from Florida illustrate how the language describing the prohibited conduct or substance in a school rule can affect the discipline that may be imposed upon students for alleged infractions. The two cases arose from an incident that occurred in a Brevard County high school in which several students engaged in the purchase, sale and use of pills that later were determined to be pure caffeine. Under the relevant school rule, students could be expelled for possession or sale of certain substances on school property, including those substances "held out to be or represented to be, controlled substances, illegal substances or counterfeit . . . illegal or controlled substances." In the two cases, the court determined that the school board properly expelled those students who sold or used the pills and represented them to be "speed." However, the court reversed the school board's decision to discipline several students on the basis of evidence that showed they had either sold or bought the pills but did not demonstrate that the students involved ever represented them to be "speed" or any other illegal or controlled substances.[139]

In *Birdsey v. Grand Blanc Community Schools*,[140] the issue arose as to what activity constituted the "sale" of an illegal substance. In *Birdsey*, a student was observed passing a cigarette-like item to a fellow student. The assistant principal questioned the students and asked them to follow him to the office. On the way there, a bag containing twenty-one handmade cigarettes fell out of the plaintiff's pocket. He later admitted the cigarettes contained marijuana and he had intended to sell one to the other students. He was expelled for sale of a marijuana cigarette. The student challenged this expulsion, citing the lack of evidence of "tender of payment." The court upheld the board's interpretation of its rule that "sale" included the act of selling.

The courts have reached varying results with regard to the scope of a school board's authority to impose discipline on students for off campus conduct. In *Labrosse v. St. Bernard Parish School Board*,[141] during an undercover police investigation of drug use at the high school, plaintiff was observed smoking marijuana with other students and nonstudents while off campus during the school lunch break. He was expelled for possession of marijuana. The expulsion was overturned under a state statute that

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[139] McEntire v. Brevard County Board, 471 So.2d 1287 (Fla. App. 1985); Jones v. Brevard County School Board, 470 So.2d 760 (Fla. App. 1985).

[140] 130 Mich. App. 718, 314 N.W.2d 342 (1983).

[141] 483 So.2d 1253 (La. App. 1986).

limited school principals' authority to suspending students for use or possession of drugs "in school buildings, or school grounds, or on school buses owned by, contracted to, or jointly owned by any city or parish school board." A Texas federal district court reached a different conclusion in *Caldwell v. Cannady*.[142] In *Caldwell*, the court upheld the expulsion of students who had been arrested for possession of marijuana off school grounds. Board policy called for expulsion of any student who sold, used or possessed any dangerous drug, whether on or off school grounds. The court rejected the plaintiffs' argument that the policy exceeded the board's authority, finding possession or use of drugs by students could have an adverse effect on the general welfare of the school.

The rules regarding the conduct of student athletes while off-campus are generally upheld unless they are "arbitrary and unreasonable and serve no legitimate end of educational athletic policy." *Braesch v. DePasquale*.[143] In *Braesch*, five student athletes were removed from the basketball team after admitting to drinking alcohol at an off-campus party. The court upheld the suspension finding that rules prohibiting the use of alcohol or drugs by student athletes are clearly appropriate and enforceable.

An Illinois court also used the arbitrariness standard in reviewing the suspension of an athlete for "anti-social" behavior. In *Clements v. Board of Education*,[144] a student challenged her suspension from a softball team based on her mere presence at a party where minors were drinking beer. Under the school's athletic code an athlete could be suspended for "insubordination, poor sportsmanship, violation of individual coach's rule, or anti-social behavior." The court reluctantly upheld the suspension for anti-social behavior, concluding that the board's action was not arbitrary or capricious. However, courts will not necessarily approve a rule that attempts to punish conduct that does not directly affect management of the school. In *Bunger v. Iowa High School Athletic Ass'n.*,[145] the plaintiff was prohibited from participating in a school football program after police caught him and three other minors in a car containing beer. The state athletic association's "good conduct rule" provided that any athlete found by a police officer in an automobile containing beer would be ineligible to participate in athletic events if he knew the beer was there. The court reversed the suspension, finding the rule invalid.

A court may also invalidate a rule if it fails to adequately notify students of the conduct prohibited. In *Claiborne v. Becke School District*[146] a federal district court ruled that a school district's drug and alcohol policy that provided for expulsion of students who used alcohol or drugs *prior* to

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[142] 340 FSupp. 835 (N.D. Tex. 1972).

[143] 200 Neb. 726, 265 N.W.2d 842 (1978), *cert. denied*, 439 U.S. 1068 (1979).

[144] 88 Ill. Dec. 601, 478 N.E.2d 1209 (1985).

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[145] 197 N.W.2d 555 (Iowa 1972).

[146] 687 FSupp. 1358 (E.D. Ark. 1988), on appeal to U.S. Court of Appeals, Eight Circuit.

coming on school grounds or to a school sponsored event violates the due process clause of the fourteenth amendment as being void for vagueness. The court found the term "prior to" lacking definitiveness since it could cover any span of time from minutes to days. The court found that such vagueness encouraged "arbitrary interpretation and enforcement."

As evidenced by these cases, policy development with regard to substance abuse by students should be undertaken carefully. NSBA's monograph *Alcohol and Drugs* recommends that a comprehensive policy in this area include the following: 1) a code of student conduct with specific discipline rules on: a) drug and alcohol use, transmittal, conspiracy to possess, possession and being under the influence; b) drug paraphernalia and counterfeit or "designer" drugs; c) violations of law clauses prohibiting any illegal conduct; d) time period during which students are subject to the policy; and e) coverage of certain out-of-school conduct; 2) notice that student lockers and desks are jointly controlled property of the school and student and are subject to inspection by school officials; 3) enumeration of prohibited activities on school grounds such as the parking lot; 4) clearly defined sanctions with provisions for consistency of enforcement; 5) due process procedures; 6) clear definition of administrative authority to deal with drugs in the school setting; 7) statement on proper handling of student records and 8) a statement concerning investigations and arrests by the police in districts schools. (*See* Appendices A-I).

- **General Procedures for Discipline Cases**

Generally, the first step in any student discipline case is the investigation. After receiving information that a student has violated school rules relating to drug use, it is standard procedure for the school official to talk to the student accused of the misconduct and ask him or her whether the student committed the act in question. After these initial discussions, the administrator may feel that he or she has enough information to make a determination. If not, the administrator should talk to other students or teachers who might have witnessed the event and gather more facts from other sources. This process is the "hearing" contemplated by *Goss v. Lopez*[16] for short term suspensions.

If it is finally determined that the student is involved with drug use or sale and that the incident warrants a short-term suspension, the administrator may impose the disciplinary measure. A notice should be sent home to the parent describing the nature of the misconduct and the punishment imposed. (*See*, Appendix I, Specimen Letter #1).

If the investigation reveals that the conduct warrants a long-term suspension (more than ten school days), the student may be suspended for up to ten school days during which time a letter should be sent home outlining the charges against the student and informing the student and his or her parents of their rights under board policy and the law, including

[16] 419 U.S. 565 (1975).

their rights with respect to a hearing. A copy of the school district policies regarding discipline procedures should be attached to this letter. (*See* Appendix I, Specimen Letter #2). This will help dispel any claims that the parent was uninformed of the procedures and possibilities for administrative relief.

If the student and/or parents request that a hearing be held, a letter notifying them of a hearing date and of the witnesses and the nature of their testimony must be sent. (*See* Appendix I, Specimen Letter #3). The letter should also detail the general ground rules for the hearing and notify the student and parents that they are entitled to have an attorney or other adult representative at the hearing.

All of the letters which are sent should be either hand delivered or sent by certified mail to help assure that no claim is made that notice was not received.

- **The Hearing Process**

There are many different ways for school districts to handle the hearing process. Generally, all parties are best served if the school principal conducts the hearings in the first instance. However, local statutes or policies may preclude such an approach. For example, some state laws require that long term suspension hearings be held initially before the board of education. State laws and local policies should be examined prior to implementation of any discipline procedures. (*See* discussion *infra,* at 58–59 for federal laws affecting discipline of handicapped students).

Several benefits arise from having the principal conduct the initial hearing. Having the principal hold the hearing helps assure that due process is afforded the student at the earliest time and at the lower administrative levels. Also, a relatively speedy appellate process is provided. Additionally, communication at this level is generally easier than at a hearing held before the superintendent or at the board level, thus reducing the chances of misunderstandings. Furthermore, holding a hearing at the principal's level will, in many instances, foreclose any request for an appeal to the school board. That, in turn, will assure that the board spends less time in disciplinary hearings and more time concentrating upon educational issues.

Another benefit of holding the hearings at the school level inures to the principal by enhancing his or her authority and leadership role. Furthermore, with this approach the administration must prepare each case and assure that due process procedures are followed. After repeating this process several times, fewer mistakes will be made, thus minimizing the likelihood of a school district being sued over procedural problems.

Since the student is entitled to a fair hearing, the principal should avoid talking in great detail to those investigating the case. Of course, there may be cases where the principal is so involved in the investigation of a case that he or she cannot legitimately serve as an impartial hearing officer. In such cases, the principal may request that the superintendent appoint another administrator to hear the case.

Some districts may choose, as an alternative, to have an administrative panel hear all long-term suspension cases in order to allow the principal to have a freer hand to investigate all discipline cases. When this option is chosen, the principal may present the evidence of the student's misconduct.

- **Procedures For Conducting a Due Process Hearing**

The procedures for conducting a hearing are quite simple. The first step is for the principal or other presiding officer to state the ground rules. An outline covering these rules should be handed out to all those in attendance so everyone will be fully apprised. (*See* Appendix I, Specimen Outline #4).

Several things about a hearing should be noted. The administration has the burden to go forward and present the administration's case that the student violated a rule and should be suspended. The proceeding should be tape recorded. This tape recording can later be used for appeals to the superintendent and the board and eventually to prepare a transcript if the case should be appealed to the courts. If the case appears to be a particularly difficult one, a court reporter might be utilized.

After the administration presents its case, the student, the parent, their representative, or their attorney should be allowed to cross-examine the witnesses put forth by the school administration. The cross-examination should be allowed for as long as the parent or their representative feels necessary. Time limits raise the spectre of unfair treatment. The presiding hearing officer, however, may require that witnesses' testimony be relevant and that hearsay be avoided.

After the administration has presented its witnesses and evidence, the student should then present his defense. Once again, time limits should generally not be placed on the student's presentation; however, the hearing officer may impose reasonable restrictions with respect to relevance and hearsay. If the hearing officer is in doubt about the admission of any evidence, it is generally safer to admit it.

After all the evidence has been presented, and rebuttal evidence and closing arguments have been heard, the hearing officer may deliberate and render a decision at a later time or may render a decision immediately. Any oral decision made at the time of the hearing should be followed up in writing to explain the basis for the decision. The principal should make specific findings of fact about what he or she determined happened. Sometimes, this will involve believing one witness' testimony over another's. Such a determination must be made since the principal is acting as a judge in this case. However, hearsay should not be the sole basis for a determination of whether the student committed the acts in question. The principal should also delineate the appropriate punishment for any offense which the principal finds that the student committed.

A notification letter informing the parent and student of the decision and of their right to appeal to the next administrative level should be sent. (*See* Appendix I, Specimen Letter #5).

- **Appeals to the Superintendent and the Board**

If the principal determines that a student committed the act(s) in question and that suspension is the appropriate punishment, the student will have a right to appeal to the superintendent and then to the board. (*See* Appendix I, Specimen Letter #6 for notice of superintendent hearing). The appeal to the superintendent should be based upon the record made before the principal or other hearing officer. The superintendent can rule based upon review of that record and upon any further argument by the administration and the pupil's representative. (*See* Appendix I, Specimen Outline #7 for suggested procedures). A full *de novo* hearing may, of course, be held at the superintendent's level where all the evidence is again presented.

If the student submits an appeal to the board, a letter which sets out the general procedures and states the witnesses who will be used at the board hearing should be sent. (*See* Appendix I, Specimen Letter #9). Generally, the hearing before the board will be a completely new hearing. That is, the witnesses will have to testify again and will have to be available. Specific local requirements or statutes may necessitate modification of this step. It is suggested that the school use an attorney at the board hearing if the student has an attorney. The procedures for the board hearing are generally the same as the initial hearing. (*See* Appendix I, Specimen Outline #10).

It is suggested that each side be asked to present proposed motions to the board. The school's attorney or whoever is presenting the case should present to the board proposed findings that state that the board finds the student committed the acts of which he or she was charged and that the board finds that the proposed punishment is appropriate. This should be stated in the form of a motion for the board to vote upon.

Once the board votes, a letter should be written to the parent and student formally notifying the parent and student of the board's decision. If the board finds that the student did commit the acts, the student and his parents will then have the right to appeal to the commissioner of education, the state courts, or the federal courts, depending upon the jurisdiction in which the school district sits. (*See* Appendix I, Specimen Letter #11).

If the student and his or her parent do not appeal, the student and his parents should be notified in writing of the suspension. (*See* Appendix I, Specimen Order #12). This board action and notice of the action may be necessary in those jurisdictions where board action is required for the suspension to be legally effective.

- **Special Problems With Respect to Hearings**

In the event of unavailable or uncooperative witnesses, affidavits from other students or patrons cannot generally be utilized in proving a school discipline case. The affidavits are hearsay, and the affiant is not subject to cross-examination by the student's representative. If a witness is not will-

ing to testify in person—whether that witness be a student, an employee, or a patron—the administration must find independent non-hearsay evidence to support the proposed disciplinary action.

Drug and alcohol cases present special proof problems. In some cases, the student may allege that the prohibited substance is, in fact, not a drug. In such a case, it will be necessary to test the substance to determine whether it is, in fact, a drug or a narcotic. Usually, local law enforcement agencies are cooperative in assisting in such a determination. The administrator who has seized the alleged drug should give it to a law enforcement agent and note that fact. It is suggested that the substance be placed in an envelope, sealed, and signed by the administrator. The envelope should then be given to the law enforcement agent. The administrator can then testify to having given the alleged drug to the law enforcement agent. Likewise, the administrator should note when he or she receives the substance back from the law enforcement agent and replace it in a sealed envelope if it does not come back in the original. These procedures are essential to maintaining adequate chain of custody. The law enforcement agent who analyzed the drug should be available to testify at the hearing. The failure to have such a witness may open the door to a charge of unfairness since a test report is technically hearsay. (*See* discussion of chain of custody, *infra* at 53–55). If, however, the student and his parent agrees that the substance is a drug, that fact may simply be stipulated to at the hearing. If the district has a drug policy which makes it a violation to sell, possess, attempt to sell, etc. what the student represents to be a prohibited substance, many of these proof problems can be minimized.

It may prove helpful to have the district's building administrators attend training sessions on the detection and identification of drugs and other controlled substances. Such sessions can probably be arranged through the local or state law enforcement agencies.

In many cases, the student and his parents do not contest that the student committed the acts of which he or she is accused. Rather, they simply wish to argue for a less stringent punishment based upon the student's record, the student's year in school, and other factors. For example, in *Lamb v. Panhandle Community School District*, 826 F.2d 526 (7th Cir. 1987), a senior student admitted drinking alcohol on a class outing but challenged the three day suspension imposed as discipline. The court found that the school afforded the student adequate due process since it notified him of the infraction, provided an opportunity to explain before suspending the student and later held a hearing before the school board. The court rejected the student's contention that since the discipline prevented him from taking his final examinations and graduating, the measure was in effect an expulsion requiring more formal procedures.

If the student and his or her parent do not wish to challenge the fact that the student committed the act, this fact should be noted on the record. Once that fact is noted, evidence and argument concerning a proper punishment may be presented. There is no need to prove-up a case in which the student admits to the acts in question. In the letters which ac-

company the determinations, this admission or stipulation should be clearly noted.

*Employees*

When a school decides to discipline a student for drug or alcohol use, the misconduct in question will most likely have occurred on the school premises or at a school-sponsored event. This may not be the case when a school employee is disciplined for engaging in substance abuse. The following cases demonstrate that a school employee's off-campus involvement with drugs or alcohol may lead to adverse employment action by the school district.

Certainly, an employee's use of drugs or alcohol during school hours may form the grounds for dismissal. For example, in *Faulkner v. New Bern-Craven County Board of Education*,[148] the court upheld the discharge of a tenured teacher for violating the statutory prohibition of "excessive use of alcohol." The teacher had repeatedly consumed alcohol during school hours, as evidenced by the smell of alcohol on his breath and frequent absences from class, even after he had been warned by the principal to cease this behavior.

Generally, when a school board attempts to fire or discipline an employee for off-campus activities, courts require the board to demonstrate a nexus between the alleged conduct and the fitness to teach. In a frequently cited opinion from California, *Morrison v. State Board of Education*,[149] the court set forth several factors to be considered, including: 1) likelihood of adverse effect on students or fellow teachers; 2) proximity or remoteness in time of conduct; 3) extenuating or aggravating circumstances; 4) motive for the conduct and 5) likelihood of recurrence.

In *Lindgren v. Board of Trustees*,[150] a tenured industrial arts and math teacher was dismissed after pleading guilty to his third offense of driving under the influence and driving without a valid license. The court overturned the school trustees' action on the grounds that the teacher's violations do not amount to "immorality, unfitness, incompetence or violation of the adopted policies of [the school] trustees" as a matter of law, nor did the trustees provide any evidence to substantiate a causal relationship between the violations and the teacher's performance of his teaching duties.

A California court took a similar approach in *Comings v. State Bd. of Educ.*,[151] when it considered two certificate revocation appeals involving teachers convicted of drug possession. In the first case the teacher was convicted in June 1967, but the local school board did not seek revocation until August 1968. At the administrative hearing no testimony was pre-

[148] 311 N.C. 42, 316 S.E.2d 281 (1984).

[149] 87 Cal. Rptr. 175, 461 P.2d 375 (1969).

[150] 171 Mont. 360, 558 P.2d 468 (1976).

[151] 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972).

sented, just evidence of the teacher's conviction. The court overturned the revocation based on a degree of "remoteness in time of conduct" and no evidence of an adverse effect on students or fellow teachers. In the second case, a tenured art teacher plead nolo contendere to possession of marijuana while on vacation in Hawaii. At the revocation hearing the assistant principal testified that parents had expressed concern at the prospect of their children being exposed to a teacher who admitted to marijuana use. The assistant principal also testified that the teacher's action was antithetical to the school's anti-drug program. The court upheld this revocation, noting that evidence of unfitness to teach may include testimony that the teacher's conduct indicates a "potential" for adverse school relationships in the future, or has achieved such notoriety as to impair those in which he is already involved.

*Rogliano v. Fayette County Bd. of Educ.*,[152] is a decision in which the West Virginia Supreme Court reinstated a teacher dismissed based on police evidence of marijuana possession and use. The case was initially remanded due to the absence of evidence of an adverse impact on the teacher's ability to teach. Earlier case law required the board to show a "rational nexus" between outside conduct and performance of job duties. The court found that any evidence of notoriety or adverse impact presented on remand was partially attributable to the board's initial failure to follow the nexus requirement which protracted the proceedings and increased the teacher's notoriety.

A Florida court in *Adams v. State Professional Practices Council*,[153] upheld revocation of the certificates of two teachers found by police with fifty-two marijuana plants in a backyard greenhouse. The record showed that their arrests were widely publicized locally and that marijuana use was considered a "very serious and morally wrong offense" in the local community. The court stated that the review council was justified in deciding that the teachers had not fulfilled their duties of providing leadership and had lost their effectiveness as teachers.

At least one court has found that a school board did not impose sufficient discipline on an employee for off campus misconduct. In a New York case, *Riforgiato v. Board. of Educ.*,[154] a tenured high school teacher was charged with four felony drug offenses involving the sale of large quantities of a controlled amphetamine-like drug. The teacher appealed the reprimand he received, claiming that the penalty was excessive. However, the court held to the contrary, finding a reprimand was so lenient as to be arbitrary and capricious and an abuse of discretion. The court remanded as to the penalty only. In *Coupeville School Dist. No. 204 v. Vivian*,[155] a Washington court reversed a hearing officer's determination

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[152] 347 S.E.2d 220 (W.Va. 1986).

[153] 406 So.2d 1170 (Fla. App. 1981), *pet. denied*, 412 So.2d 463 (Fla. 1981).

[154] 86 App. Div. 2d 757, 448 N.Y.S.2d 74 (1982).

[155] 36 Wash. App. 728, 677 P.2d 192, *rev. denied*, 101 Wash. 2d 1018 (1984).

regarding dismissal of a twenty-three year veteran teacher. The school district wished to dismiss him based on an incident in which he allowed two 16-year old girls (one a student, one a former student) to visit his home and drink hard liquor and beer to the point of intoxication. Conflicting testimony was presented at an administrative hearing about whether his actions would impair his effectiveness as a teacher. The hearing officer found that the teacher had exercised extremely poor judgment, but that the school district had not demonstrated that his conduct would materially and substantially affect his teaching. The court overturned the hearing officer's finding as arbitrary and capricious and an error of law.

The discharge of an employee found to be involved with drugs may be based on a number of grounds including dishonesty, immoral character or conduct. In *Summers v. Vermillion Parish School Bd.*,[156] the court upheld dismissal of a tenured principal on grounds of dishonesty and willful neglect based on his arrest on a charge of possession (off-campus) of marijuana with intent to distribute. The court rejected the principal's assertion that the school board could not assume his drug involvement automatically formed a legal basis for his dismissal.

In *Board of Educ. of Hopkins Co. v. Wood*,[157] two teachers were dismissed for immoral character and conduct unbecoming a teacher based on testimony of two 15-year old female students that they had smoked marijuana with the teachers at the teachers' apartment during the summer. The teachers argued unsuccessfully that the board had no authority to terminate them for acts committed during off-duty hours during the summer in the privacy of their own apartment. Finally, in *Governing Bd. of Nicasio School Dist. of Marin County v. Brennan*,[158] a probationary teacher signed an affidavit in support of a friend facing drug charges. In the affidavit she stated that she believed marijuana use was not harmful. As evidence of this view, she described her beneficial and daily use of marijuana. Her affidavit received local and national press coverage. She was discharged for immoral conduct. No evidence of effect on students was offered at appeal because she was removed before an effect could develop. Nevertheless, the court upheld her dismissal based on testimony of a superintendent of the likely negative effect on students.

When a school district decides to discipline an employee for drug or alcohol use, it must make certain to afford the employee full due process protection. While the due process considerations for terminating an employee are similar to those applicable to disciplinary action taken against

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[156] 493 So.2d 1258 (La. App.), *cert. denied*, 497 So.2d 312 (La. 1986).

[157] 717 S.W.2d 837 (Ky. 1986). *See also* Blaine v. Moffat County School District, 748 P.2d 1280 (Colo. 1988) (teacher dismissed for neglect of duty in allowing cheerleaders to purchase and consume alcohol during school-sponsored event); Norton v. Board of Education, 748 P.2d 1337 (Colo. 1987) (teacher dismissed for providing alcohol to underaged students).

[158] 18 Cal.App.3d 396, 95 Cal. Rptr. 712 (1971).

a student, they are not entirely identical. The following discussion which examines these considerations in general certainly applies to employees disciplined or dismissed for drug related misconduct.

- **Property or Liberty Interest Must be Present**

Due process is by no means an automatic entitlement. Rather, the threshold inquiry is not the nature and extent of due process that a person might be entitled to, but whether there is a property or liberty interest to be protected, and, if so, what nature and degree of process that interest merits before a person may be deprived of it.

In *Board of Regents v. Roth*,[159] the Supreme Court stated:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

The Supreme Court in *Roth* observed that undeniably, the teacher's reemployment prospects were of major concern to him and that a weighing process has long been a part of any determination of the form of hearing that is required in a particular situation by procedural due process. However, it is the interest, i.e., liberty or property, and not the procedure, that must first be established. "But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. (citations omitted) We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[160]

By way of example, in *Perry v. Sindermann*, the Supreme Court noted that a teacher deprived of employment may not necessarily possess a liberty or property interest:

> the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract.[161]

No matter what the source of the property or liberty interest, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the due process clause.[162]

If an educational employee is able to assert deprivation of a protected property or liberty interest, then due process requires that certain procedural safeguards be extended before a school district may finally extin-

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[159] 408 U.S. 564, 569-70 (1972).

[160] *Id.* at 570-71.

[161] 408 U.S. 593, 599 (1972).

[162] Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978).

guish that interest. *Hostrop v. Board of Junior College District* (Hostrop I).[163] The courts have made it clear that pleading the existence of a property or liberty interest is a threshold requirement beyond which a plaintiff may not continue his lawsuit claiming entitlement to due process, regardless of the position held or the nature of the plaintiff's claim.[164]

- **Sources of Property Interests**

In meeting the threshold requirement that a property interest must be pled before entitlement to due process arises, a plaintiff must allege the source of the claimed property interest. The familiar refrain of *Roth* presents the starting point for this identification of the source of a property interest:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[165]

The Supreme Court reiterated this holding in the context of student suspensions in *Goss v. Lopez*:[166] "Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process."

In *Perry*, the Supreme Court noted the multitude of possible sources of a property interest in employment:

> "[P]roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." (citations omitted) A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[167]

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[163] 471 F.2d 488, 494 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1978), *on remand to* 399 F.Supp. 609 (N.D. Ill. 1974) *cause remanded by* 523 F.2d 569, *cert. denied*, 425 U.S. 963 (1976).

[164] *See, e.g.*, Daly v. Sprague, 675 F.2d 716 (5th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983), *appeal after remand*, 742 F.2d 896 (5th Cir. 1984) (tenured professor facing loss of clincal privileges); Cohen v. Board of Education, 536 F.Supp. 486 (S.D.N.Y. 1982) (tenured teacher facing layoff); Yashon v. Hunt, 696 F.2d 468 (6th Cir. 1983) (state university hospital staff physician denied reappointment); Lillard v. Delaware State Hospital, 552 F.Supp. 711 (D. Del. 1982) (merit system state employees); Goetz v. Windsor Central School District, 698 F.2d 606 (2d Cir. 1983) (discharge of school cleaner).

[165] *Roth*, 408 U.S. at 577.

[166] 419 U.S. 565, 573 (1975).

[167] *Perry*, 408 U.S. at 601.

A school employee's property interest in continued employment may be created by state constitution, state statutes, institutional rules and regulations, employer customs and practices or employment contracts.

The Supreme Court recently made it clear that "property cannot be defined by the procedures provided for its deprivation . . . ." *Cleveland Board of Education v. Loudermill*.[168] In describing the categories of substance and procedure as "distinct," the Court flatly rejected the "bitter with the sweet" approach first articulated in *Arnett v. Kennedy*.[169] That analysis reasoned that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining the right," the substantive right cannot legally be separated from the procedures enforcing it. The *Loudermill* Court disagreed, stating: " 'While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' "[170] Although the Court speaks in terms of *deprivation* of a property right which the state has somehow otherwise conferred, rather than in terms of the *creation* of the property right itself, the Court does not rule out the possibility that certain property rights might not exist at all absent compliance with certain "procedures;" i.e., a person may only acquire the right when certain preconditional steps are followed.

- **Liberty Interests In Public Educational Employment**

In addition to life and property, liberty enjoys the protection of the due process clause of the fourteenth amendment. Even a public employee who has no property interest in employment and who serves only at the pleasure of the employer has a liberty right to seek other employment. A liberty interest arises when, in connection with the termination of employment or a governmental benefit, the employer makes a charge which is disclosed to the public and which seriously impairs the employee's reputation for honesty or morality. If the employee contests the accuracy of the charge, due process requires that he be given a hearing to clear his name and thus protect his liberty to seek other employment. *Codd v. Velger*.[171] A label which would prevent a person from practicing his chosen profession may have consequences so severe that liberty would be infringed. *Stretten v. Wadsworth Hospital*.[172] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[173]

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[168] 470 U.S. 532, 541 (1985).

[169] 416 U.S. 134 (1974).

[170] *Cleveland Board* 470 U.S. at 541, *citing*, Arnett v. Kennedy, 416 U.S. 134, 167 (1974).

[171] 429 U.S. 624, 626 (1977). *See also Bishop, 426 U.S. at 347-49; Roth*, 408 U.S. at 573.

[172] 537 F.2d 361, 366 (9th Cir. 1976).

[173] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The failure of a public employee to demonstrate a property interest in continued employment will not defeat a properly asserted liberty interest claim. *Loehr v. Ventura County Community College District*.[174] The Ninth Circuit has taken pains to define the extent of a liberty interest injury that presents a cognizable claim: To implicate a constitutional liberty interest, the reasons for dismissal must be sufficiently serious to "stigmatize" or otherwise burden the individual so that he is not able to take advantage of other employment opportunities. The stigma must *seriously* damage a person's reputation or *significantly* foreclose his freedom to take advantage of other employment opportunities.[175] Procedural protections of due process apply if the accuracy of the charge is contested, if there is some public disclosure of the charge and if the charge is made in connection with termination of employment or the alteration of some right or status recognized by state law.

- **Procedural Due Process: The Nature of the Entitlement**

Once entitlement to procedural due process is established, the question arises as to the nature and extent of due process that should be accorded. In *Logan v. Zimmerman Brush Company*[176] the Supreme Court held:

> As our decisions have emphasized time and time again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "*some* form of hearing" is required before the owner is finally deprived of the protected property interest . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. (citations, footnote omitted.)
>
> On the other hand, the Court has acknowledged that the timing and nature of the required hearing "will depend upon the appropriate accommodation of the competing interests involved."

The timing of the hearing may depend upon whether there is a property interest or a liberty interest at stake. For example, in *Matheus v. Eldridge*[177] the Supreme Court held: "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of the property interest." With respect to a liberty interest hearing, however, a post-termination hearing usually suffices, since the purpose of that is to allow name-clearing, not an examination of the merits of a dismissal, unless a property interest requiring a pre-deprivation hearing under the *Matheus* balancing test is also implicated. *Vanelli v. Reynolds*

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[174] 743 F.2d 1310, 1317 (9th Cir. 1984).

[175] Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1100 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

[176] 455 U.S. 422, 433-34 (1982).

[177] 424 U.S. 319, 333 (1976).

*School District*.[178] While it is clear that due process does not require a full adversary hearing,[179] the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.[180]

Distilling the requirements of its previous decisions in *Matheus v. Eldridge*,[181] the Court held three factors essential to determine what process is due. First, the private interest to be affected by the official action must be considered; next, the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedures, and last, the government's interest, including the governmental function involved and the fiscal or administrative burden that the additional or substitute procedural requirement would entail must be considered. Of course, even when a state procedural format purporting to ensure due process protections for deprivation of a liberty or property interest does exist, that procedural format must satisfy these federal minimum due process guarantees. That is, the procedural protections that attach to a constitutionally protected interest are defined by *federal constitutional standards of due process, not* by state procedural rules or statutes, whether or not the state rules and statutes fall short of, satisfy, or exceed the minimum required by the federal constitution.[182]

The Supreme Court recently reaffirmed the validity of such an analysis to determine the appropriate due process rights. In *Cleveland Board of Education v. Loudermill* the Supreme Court ruled that state civil service employees who have a protected property interest in their employment are entitled to a pretermination "hearing." In reaching this conclusion, the Court placed heavy emphasis on retaining one's employment, while finding that affording the employee an opportunity to respond prior to termination would not impose "a significant administrative burden nor intolerable delays."[183] The Court said both parties have an interest in avoiding disruption and erroneous decisions.

- **Notice of Charges**

Although the preparation and service of charges upon the accused generally represents one of the most elementary requisites of due process,[184] in particular instances, actions of educational employers may put an employee on notice that he has been accused of unsatisfactory performance without the employer ever having formally adopted charges.

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[178]667 F.2d 773, 780 (9th Cir. 1982).

[179]Heath v. Redbud Hospital District, 620 F.2d 207, 212 (9th Cir. 1980).

[180]Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[181]*Matthews*, 424 U.S. at 335.

[182]Goss v. Lopez, 419 U.S. at 574; Pedersen v. South Williamsport Area School District, 697 F.2d 312, 317 (3d Cir. 1982), *cert. denied*, 459 U.S. 972.

[183]*Cleveland Board*, 470 U.S. at 544.

[184]*Goss*, 419 U.S. at 581-582; *Arnett*, 416 U.S. at 152-154.

For example, in *Zumwalt v. Trustees of California State Colleges*[185] the California Court of Appeals noted that no charges were ever made against Dr. Zumwalt despite his removal accompanied by campus police, changed locks, sealed files, and rampant publicity. Still, it is hardly reasonable to expect an employee to prepare a defense in the absence of specific charges that put him on notice of the allegations against which he must defend.[186] Thus, what constitutes adequate and specific notice of charges in order to allow the employee to respond at a meaningful time in a meaningful manner is defined by the *Mathews* factors as applied to the specific situation.

- **Reasonable Opportunity to Respond**

Depending on the notice of the deprivation, either pre-deprivation due process or post-deprivation due process may suffice. In either case, the opportunity provided must contemplate the opportunity for a meaningful response. For example, in *Jones v. Los Angeles Community College District*[187] the college district's dismissal of an employee for accepting other employment while on sick leave did not comport with due process, because in the absence of an emergency, the college was required to give the employee an effective opportunity to confront the charges and the evidence prior to termination.

- **Nature of Due Process Hearing**

Aside from the basic requirement that the due process must meet federal constitutional standards, the nature of the hearing required is often flexible and peculiar to the elements to each fact situation.

For example in *Loudermill*, the Supreme Court ruled that the pretermination "hearing" employers must accord state civil service employees need not be elaborate. The Court indicated that "something less" than a full evidentiary hearing will suffice prior to adverse administrative action. The purpose of the hearing in such an instance is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action,"[188] not to resolve definitively the propriety of the discharge. To this end the employee must be given an

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[185] 33 Cal. App. 3d 665, 667, 109 Cal.Rptr. 344, 353 (1973).

[186] See, e.g., Jackson v. Independent School District, 648 P.2d 26 (Okla. 1982) (notice of termination is jurisdictional requirement as well as a fundamental requisite of due process); Wells v. Dallas Independent School District, 576 FSupp. 497 (employer's failure to provide employee with minimal notice in advance of the hearing of the reasons for his termination constituted deprivation of due process); Kempland v. Regents of the University of California, 155 Cal.App.3d 644, 202 Cal. Rptr. 275 (1984) (failure to provide meaningful opportunity to respond violates due process; notice of proposed action insufficient); Parratt v. Taylor, 451 U.S. 527, 540-41 (1981) (governmental entity not always required to provide a hearing prior to initial deprivation of property).

[187] 702 F.2d 203 (9th Cir. 1983).

[188] *Cleveland Board*, 470 U.S. at 545-46.

opportunity to present reasons, either in person or in writing, as to why the proposed action should not be taken. The Court concluded: "To require more than this [notice of the charges, an explanation of the employer's evidence and an opportunity to present the employee's side of the story] would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."[189]

Even though the formality of the hearing may be something less than would be expected in a court of law, it is essential that the employee have at some point an opportunity "to present witnesses and confront adverse evidence at the hearing."[190] Due process requires an opportunity to confront and cross-examine witnesses in almost every setting which involves a factual determination.[191]

As the majority of recent educational employment law cases rely on the *Mathews* standard as articulated by the Supreme Court, educational employers should examine their own hearing procedures in light of the three *Mathews* factors to determine whether the nature of the hearing provided to terminated employees meets federal constitutional standards for procedural due process.

- **Burden of Proof**

Although the *Mathews* standard does not specifically discuss the burden of proof required at a dismissal hearing, clearly the evidence in the record must at least be considered and must support or sustain the findings rendered by the hearing body. In *Jackson v. Independent School District*[192] the Oklahoma state court noted that the absence of required findings invalidated an administrative decision even though the record disclosed evidence to support appropriate findings. According to a Kansas state court, the failure of all of the board members to read each and every part of the hearing transcript in reviewing the decision of a hearing body did not violate due process.[193] The court held due process satisfied if the content of the record was available to the board through its staff, board members or counsel, and if the board members considered the content.

The school district employer proposing the disciplinary action has the burden of proof in an evidentiary hearing. In California, the standard of proof required of an administrative agency hearing evidence in support of a recommendation for dismissal is that the findings of the agency must be supported by the weight or the preponderance of the evidence.[194]

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[189] *Id.* at 546.

[190] *Hostrop*, 471 F.2d at 495.

[191] McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).

[192] 648 P.2d 26 (Okla. 1982).

[193] Kelly v. Kansas City, 231 Kan. 751, 648 P.2d 225 (1982).

[194] Chamberlain v. Ventura County Civil Service Commission, 69 Cal. App. 3d 362, 138 Cal. Rptr. 155 (1977).

- **Impartial Hearing**

Like the other elements of due process in the context of educational employment, impartiality of the hearing officer or hearing body is a relative concept. This is particularly true in the case of local school boards. The Ninth Circuit rejected a teacher's claim that a board member should have recused himself from the hearing because his son was dating one of the girls who filed charges against the teacher in *Vanelli v. Reynolds*.[195] The court stated that members of a school board in a small community may well have some knowledge of the facts and personalities involved in situations which they must then evaluate. They do not necessarily have to recuse themselves, but they must act impartially and in a fair manner.

The fact that a school board voted initially to consider termination of the superintendent, heard complaints about him from the community, decided to initiate termination proceedings, and decided to terminate the superintendent based on the evidentiary record made by the hearing officer does not, in the absence of evidence that the board prejudged the facts, constitute a denial of due process.[196] However, when in *Hostrop II* a school board had decided, in advance of the hearing, that it would terminate a college president, and had already made a commitment to that person to hire him as interim president, the employee's right to procedural due process had been violated.[197]

Some practices may affect impartiality to an extent amounting to a due process violation. The Sixth Circuit in *Kendall v. Board of Education*[198] held that the school board's grievance procedure did not satisfy due process because it compelled the teacher to appear before the same administrators who had investigated the incidents and recommended her dismissal. Since factfinding on the accusations against the teacher was necessary, due process required that the same administrators who investigated the matter not determine guilt or innocence.[199] Also, the dual role of a school board's attorney in serving as the district's advocate in the case before the hearing officer and in subsequently acting as the board's counsel at a special meeting called to consider the hearing officer's report was held to constitute a denial of due process to the dismissed tenured teacher in *Lockhard v. Board of Education*.[200]

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[195] *Vanelli*, 667 F.2d at 780.

[196] Wedergren v. Board of Directors, 307 N.W.2d 12, 17 (Iowa 1981).

[197] Hostrop v. Board of Junior College District No. 505, 523 F.2d 569, 575 (7th Cir. 1975) (Hostrop II).

[198] 627 F.2d 1, 5 (6th Cir. 1980).

[199] *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Hortonville Joint School District No. 1 v. Hortonville Education Assoc., 426 U.S. 482, 490 (1976).

[200] 668 P.2d 959 (1983), *aff'd in part, rev'd in part*, 687 P.2d 1306 (Colo. 1984).

- **Administrative Review and Findings**

In *Wells v. Dallas Independent School District*[201] the federal district court in examining the findings against the former assistant superintendent held that while findings of a school reviewing body are not to be accorded the stature of findings of a district court, when reached by application of correct procedures, they are entitled to great weight and that the court should never lightly substitute its judgment for that of the hearing board. In examining the assistant superintendent's claim that the administrative council reviewing his case was not an impartial tribunal, the district court noted the extensive hearing conducted and the opportunity afforded Wells to cross-examine and to present evidence on his own behalf. On this basis the court found the administrative council to be an inadequate tribunal. Since the Constitution requires only a single hearing before an impartial decision maker, the case merited no further administrative review.

### *Due Process and Drug Testing*

As demonstrated by the court's decision in *Capua v. City of Plainfield*,[202] a public employer must afford due process at all stages of a drug testing program. The *Capua* court found that the city firefighters subjected to mass, mandatory urinalysis had a property interest in their employment and a liberty interest in maintaining their individual reputations, both of which the city could not deprive without procedural due process. In this case, the court found that the city utterly failed to provide the necessary procedural safeguards. The test was unilaterally imposed as a condition of employment without prior notice to the firefighters and without opportunity of the employees to object or to seek the advice of counsel. No standards had been established to govern the surprise mass testing, nor were provisions made to protect the confidentiality of the physiological information the test might yield. The city also violated due process by coercing the employees to submit to the test at the risk of immediate discharge. The court also criticized the city's failure to allow those who tested positive a full opportunity to evaluate and review the test results or to have their own specimen retested by a technician of their choice. The court found that given the numerous questions raised about the reliability and accuracy of urinalysis tests and the well documented dangers of relying on such tests results, such refusal "offends traditional notions of fundamental fairness."[203]

The city's due process violations extended to the failure to follow the procedures required by state statute for the termination of public employees. The city's investigation consisted solely of the urinalysis test, which if positive resulted in immediate termination without pay. The city

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[201] *Wells*, 576 FSupp. at 503.

[202] 643 FSupp. 1507 (D.N.J. 1986).

[203] *Id.* at 1521.

made no indication that it would conduct second confirmatory tests, nor did it mention in the written complaints the hearing procedures to which the discharged employees were entitled. The court ruled that absent a sufficient procedural framework, defendant's delay in issuing the written complaints setting forth the charges was also unjustifiable.

### *Reliability of Testing and Chain of Custody*

The *Capua* court's concern with the accuracy and reliability of certain urinalysis methods and the accompanying due process implications has been raised by other courts reviewing the validity of drug testing programs. In fact, in at least two cases directly involving the testing of students or school employees, the courts discussed at length the problems of relying on the results of the EMIT test as the basis for disciplinary action against students and employees.[204] Those courts' rejection of the use of a single positive test result using the EMIT urinalysis method as a basis for disciplinary sanctions stemmed from the possibility of false positives, the inability of the test to pinpoint the time of ingestion of the drug (particularly marijuana), the frequency of use, degree of intoxication or to indicate any relevant impairment in job or school performance.

Other courts have reached different conclusions about the reliability of the EMIT test and the constitutionality of relying on one positive unconfirmed test result as a basis for depriving various property or liberty interests. *E.g.*, *Wykoff v. Resig*.[205] Certainly, in the interest of avoiding any due process challenge on this basis, a school district is well-advised to conduct a second confirmatory test before contemplating any disciplinary measures. In *Wykoff*, the court held that appropriate due process required that all positive results of an EMIT test for marijuana be confirmed by a second test before imposing discipline upon a prison inmate.

The *Wykoff* case raised a second issue regarding the reliability of drug testing results and their use as a basis for disciplinary action—that of chain of custory. As briefly discussed above, due process requires that the chain of custody of any confiscated drugs that are subjected to laboratory analysis to determine the presence of a prohibited substance be carefully preserved and documented by the school district. This applies equally to any urine samples taken for drug detection purposes. In *Wykoff* the court found that even in the context of the limited rights of prisoners, minimum due process requires that the handling and processing of urine samples "be done in such a way as to insure the basic integrity of the system."[206] The court declared that an inmate has a right to expect minimum due process safeguards to insure that there is no tampering or mishandling of samples. The court advised that the procedures must be "reasonably

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[204]Anable v. Ford, 653 FSupp. 22 (W.D. Ark. 1985), *modified by*, 663 FSupp. 149; Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987).

[205]613 FSupp. 1504 (N.D. Ind. 1985) and cases cited therein.

[206]*Id.* at 1513.

definite and must be fully and carefully documented at all stages."[207] In the court's view, maintaining adequate chain of custody requires that the urine samples be sealed and appropriately labelled in the presence of the donor, the keeping of a written record on the location and transportation of the urine sample at all times, and storage of the samples in locked refigerators with very limited access. The court also instructed that minimum due process requires that the specimen donor receive a duplicate copy of the test results from the laboratory that conducted the test.

Issues of test accuracy and chain of custody may also raise fourth amendment concerns. A New Jersey district court has recently held that "the Fourth Amendment requires satisfaction that the methods contain at least some modicum of reliability to pass the threshold of reasonableness." *Egloff v. New Jersey National Guard.*[208] Although the court found that the government had sufficient individualized suspicion to compel Egloff to submit to urinalysis, it refused to approve the testing procedures where the plaintiff "was simply given an opened, unlabeled bottle and told to fill it."[209] The court noted that "there were no apparent provisions for insuring non-adulteration of the sample or protecting its chain of custody."[210] The court considered it important that test subjects be allowed to have their specimens tested by another laboratory when determined to be postiive. The opportunity to have positive specimens tested independently has been held by other courts to be necessary to satisfy due process.[211]

The importance of obtaining accurate urine drug test results and maintaining adequate chain of custody is clearly reflected in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" recently issued by the Alcohol, Drug Abuse and Mental Health Administration of the U.S. Department of Health and Human Services pursuant to Executive Order No. 12564.[212] These guidelines:

> establish comprehensive standards for all aspects of laboratory drug testing and laboratory procedure to be applied to [drug testing programs of federal employees], including standards which require the use of the best available technology for ensuring the full reliability and accuracy of drug tests and strict procedures governing the chain of custody of specimens collected for drug testing; specify the drugs for which Federal employees may be tested; and establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform drug testing [programs for federal agencies].[213]

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[207] *Id.*

[208] No. 86-4175 (D.N.J. April 27, 1988).

[209] *Id.*

[210] *Id.*

[211] *E.g.*, Banks v. FAA, 687 F.2d 92 (5th Cir. 1982).

[212] 53 Fed. Reg. 11,970 (April 11, 1988).

[213] *Id.* at 11,970.

Under these provisions, certified laboratories must inform their non-federal clientele that the testing standards being used conform to the federal guidelines. Although not applicable to drug testing programs outside the federal government, the guidelines do discuss many of the practical and scientific considerations inherent in the actual implementation of such a program and the importance of selecting a qualified laboratory to conduct the urinalysis. Some states have also passed laws that regulate employer drug testing programs. (*See* Appendix M).

## HANDICAP ISSUES

### *Section 504 of the Rehabilitation Act*

- **Employees**[214]

Both federal and state laws prohibit an employer from discriminating against a handicapped or disabled employee. Under federal law, § 504 of the Rehabilitation Act prohibits discrimination "under any program or activity receiving federal financial assistance."[215] Employers receiving federal financial assistance are prohibited from discriminating under "any program or activity" receiving such assistance against "otherwise qualified handicapped individuals" solely on the basis of their handicap.[216]

The question whether a substance abuser is "handicapped" within the meaning of the Act and, thus, entitled to its protection must be addressed. The Act states that:

> For purpose of sections 503 and 504 as such sections relate to employment, such term does not include any individual whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or safety of others.[217]

Thus, it appears that current drug or alcohol abusers who, due to their addictions, are unable to perform their jobs, or who pose a threat to the property or safety of others, receive no statutory protection.

In the case, *New York City Transit Authority v. Beazer*,[218] the Supreme Court held that the New York City Transit Authority could prohibit the employment of individuals on methadone maintenance programs. The Court held that this exclusion was permissible because the rule was sufficiently job-related and not motivated by discrimination. Instead, the rule served the general objectives of safety and efficiency.

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[214]Portions of the following discussion on Section 504's prohibition of handicap discrimination in employment with respect to drug use have been excerpted from Bittle, E. "Drug Testing," as reprinted in *School Law in Review-1987* 37-39 (NSBA, 1987). Original printed at West's 36 Educ. L Rep. 1067. Reprinted here with permission.

[215]29 U.S.C. § 794 (1985).

[216]*Id.*

[217]*Id.* at § 706(7)(B).

[218]440 U.S. 568 (1979).

A different situation is presented by individuals who have successfully conquered their addictions. The Act defines a handicapped individual as follows:

> any person who (i) has a physical or mental impairment which substantially limits one or more or such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.[219]

While this definition was amended in 1978 to exclude individuals whose current use of alcohol or drugs prevents the individual from performing his job or poses a safety hazard to others, it has been held to apply to individuals who have successfully conquered their addictions.[220]

In a recent case, *Burka v. New York City Transit Authority*,[221] present, former and prospective employees of the city transit authority challenged a urinalysis testing program on a number of grounds including violation of § 504 of the Rehabilitation Act. The court rejected the claim under the handicap protection law, ruling that § 504 protects only those otherwise qualified drug abusers who have been or are being rehabilitated and does not protect the illegal narcotics abuser who has not sought or is not seeking treatment for his or her condition.

An employee may also be covered by state law regarding handicap discrimination. Most states have laws prohibiting discrimination against employees on the basis of handicaps or disabilities. A large percentage of these state statutes do not explicitly define the term "handicap" to include alcoholism or drug addiction, but some statutes are written so broadly that the term "handicap" may possibly include alcoholism or drug addiction.

Once an employee is considered to be handicapped, the employer may be required to make reasonable accommodations for the employee's handicap. Section 504 of the Rehabilitation Act of 1973 provides that no otherwise qualified handicapped individual shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance. Under regulations codified at 45 C.F.R. § 84.12, a recipient of federal funds shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped employee unless the recipient can demonstrate that the accommodation would impose an "undue hardship" on the operation of the program. Under the regulation, reasonable accommodation includes: 1) making facilities used by employees readily accessible to and usable by

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[219] 20 U.S.C. § 706(7)(B) (1985).

[220] Tinch v. Walters, 574 FSupp. 346, 348 (E.D. Tenn. 1983) (rehabilitated alcoholics are otherwise qualified handicapped individuals within the meaning of § 504); Traynor v. Walters, 606 FSupp. 391, 398-99 (S.D. N.Y. 1985); McKeldei v. Walters, 596 FSupp., 1317, 1323-24 (D.D.C. 1984) *rev'd*, 792 F.2d 194; Simpson v. Reynolds Metal Co., 629 F.2d 1226, 1231, n.8 (7th Cir. 1980) (employees with prior history of drug addiction are handicapped).

[221] 680 FSupp. 590 (S.D.N.Y. 1988).

handicapped persons; or 2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

In determining whether an accommodation would impose an "undue hardship" on the operation of a recipient's business, factors to be considered under the regulation include: 1) the over-all size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; 2) the type of recipient's operation, including the composition and structure of the recipient's workforce; and 3) the nature and cost of the accommodation needed.

Finally, a recipient may not deny any employment opportunity to a qualified handicapped employee if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee.[222] Although no case law has clarified what reasonable accommodation may be necessary for covered drug abusers, several cases have required employers to accommodate alcoholic employees willing to submit to rehabilitation.[223]

It is possible, however, that situations may arise where an employer cannot make a reasonable accommodation. In *Copeland v. Philadelphia Police Department*,[224] the Third Circuit upheld the discharge of a police officer based on the positive results of a compelled urinalysis test. Finding no constitutional violations in the city's actions, the court also ruled that the city had not violated § 504 of the Rehabilitation Act. The court reasoned that a police officer handicapped by drug addiction is not "otherwise qualified" to perform the job since the very nature of the job requires the officer not to engage in unlawful behavior. The court further declared that the police department could not reasonably accommodate an illegal drug user within its ranks since to do so would constitute a "substantial modification" of the department's essential functions.

- **Students**

Section 504 may also affect a school district's response to students involved in drug use or distribution. In 1985 the U.S. Department of Edu-

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[222] In Smith v. Board of Education of Fort Madison Community School District, 293 N.W.2d 221 (1980), the Supreme Court of Iowa established some factors that may be helpful in determining whether termination of an employee is appropriate, although the case was not decided under the Iowa civil rights statute. The *Smith* decision involved a teacher termination case under the Code of Iowa Chapter 279, which deals with teacher evaluations and terminations. The Iowa Supreme Court, in *Smith*, addressed a case involving termination of a teacher for alleged mental or physical disability. The court stated: "Among the appropriate factors to consider are the nature and extent of the duties required by the contract, the character,and possible duration of the illness, the needs of the employer and the extent to which the duties can be performed by another." *Id.* at 224.

[223] *E.g.*, Whitlock v. Donovan, 598 FSupp. 126 (D.D.C. 1984), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986); Walker v. Weinberger, 600 FSupp. 757 (D.D.C. 1985).

[224] 840 F.2d 1139 (3d Cir. 1988).

cation Office of Civil Rights (OCR) determined that a school district in Washington State violated § 504 by failing to evaluate a student who it knew had drug and alcohol dependency problems and who exhibited poor academic performance and excessive truancy. *Lake Washington School District No. 414*.[225] The district followed a policy of recognizing and evaluating only those students who it believed were handicapped within the meaning of the Education for All Handicapped Children Act (EAHCA). Consequently, it did not evaluate any students with alcoholism or drug addiction based solely on the presence of such condition. Finding these practices in violation of § 504, OCR stated that § 504 provides protection to a broader group of handicapped students than the EAHCA and that alcohol and drug addicts are "qualified handicapped persons for purposes of § 504 if their impairment substantially limits one or more of their major life activities." OCR also pointed out that an appropriate education under § 504 can consist of education in regular classes with or without supplementary services, or special education and related services. OCR carefully noted that § 504 does not require the provision of medical services to a handicapped child. The school district also violated § 504 by failing to notify handicapped students and their parents of their rights and the school district's duties under the law.

The *Lake Washington* determination contrasts with OCR's findings after an investigation of an Illinois school district for alleged violation of § 504. *York (IL) Community High School*.[226] There, OCR found that the school district had not violated § 504 by failing to evaluate a student for special education purposes until his parents requested that the school do so, when the student faced expulsion for distributing marijuana at school. OCR based its determination on the school's annual notification of parents of available special education services and the lack of the school's awareness of the student's involvement with drugs; his academic performance remained stable in the low average range and his disciplinary record indicated only two drug related incidents that had occurred over a long period of time. OCR also pointed out that the school district had no policy or practice of categorically refusing to evaluate students who may require special education because they are substance abusers.

At least one state education agency has relied on the *Lake Washington* determination in finding that a school district violated § 504 by failing to identify and evaluate a student who it knew had past problems with alcohol.[227] The state hearing officer noted that the school district had no mechanism in place to notify students and parents of their rights and of the district's obligations under § 504. The officer stated that the burden is

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[225]Complaint Letter of Finding, Office of Civil Rights (U.S. Dep't Educ. June 28, 1985), Educ. Hand. L. Rep. 257:611.

[226]Complaint Letter of Finding, Office of Civil Rights (U.S. Dep't Educ. Nov. 19, 1985), Educ. Hand. L. Rep. 352:116.

[227]Matter of Dale Shroyer, 1986-87 Educ. Hand. L. Rep. Dec. 508:871 (Dec. Supt. Publ. Instruc., July 24, 1987).

on the school, not the student or parents, to recognize a situation where evaluation is needed.

In the hearing officer's view, the school district also violated § 504 in applying to the student an attendance/credit rule which generally results in loss of all academic credit when a student has 12 or more absences in a semester. The officer believed the application of this standard rule violated § 504 because it did not take into account the student's individual needs. Finally, the district's suspension of the student which continued for six weeks during which he received no educational services was found to violate § 504 since the disciplinary action constituted a change in placement requiring a meeting of a handicap evaluation team.

### *Education for All Handicapped Children Act*

Although drug addiction and alcoholism do not constitute handicaps within the meaning of the Education for All Handicapped Children Act (EAHCA),[228] this statute still limits the manner in which schools may deal with students found to be violation of rules involving drug and alcohol possession, use or distribution. If a student by virtue of some other condition is handicapped within the meaning of the EAHCA, a school may not impose suspensions in excess of ten days or expulsions for drug-related infractions unless the child's current IEP expressly allows such disciplinary action or without first securing parental consent or a waiver of consent, completing the IEP and administrative hearing process or obtaining a court order. In *Honig v. Doe*,[229] the U.S. Supreme Court made clear that long-term suspensions and expulsions are changes in the child's educational placement which trigger the full procedural protections of the EAHCA. Although the *Honig* case involved students whose conduct was related to their handicaps, the Court's strict interpretation would seem to apply as well where the misconduct is not related.[230] Thus, school districts must be aware when disciplining handicapped students for misconduct involving drugs or alcohol, that it must comply with the requirements of the EAHCA and that using *Goss v. Lopez* due process procedures may not be sufficient.

## PRIVACY RIGHTS

In addition to the constitutional privacy issues raised by the fourth amendment of the U.S. Constitution, schools in dealing with substance abuse by students or employees must also be aware of other privacy considerations imposed by statutes or the common law.

Before examining statutory and common law privacy concerns, it should be noted that constitutional protection of privacy may extend be-

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[228] 20 U.S.C. § 1400 *et seq.*

[229] 108 S.Ct. 592 (1988).

[230] *See* Bryant, T. "Honig v. Doe: The Latest Word on Discipline of Special Education Students," *Inquiry and Analysis* (National School Boards Association, May 1988).

yond the explicit prohibition against unreasonable search and seizure to "penumbral" privacy rights. For example, in *Shoemaker v. Handel*,[231] the court notes that there is a privacy interest in avoiding disclosure to government agents of personal medical information, which must be balanced against the legitimate interests of the state in securing information. The court, cautioning that the state must use the narrowest means consistent with its legitimate interests, disapproved a question on a state medical disclosure form which required jockeys to state the nature of illnesses for which they take prescription drugs. The court questioned whether disclosure of this information would further the state's interest in preventing illicit use of drugs. The court also discussed the need to protect the confidentiality of information obtained through a drug testing program or from medical forms. In this regard, the court considered the fact that access to results of the urinalysis would be limited to the racing commissioners and executive director and the subject jockey except in instances of a contested matter and that any data collected would not be shared with criminal law enforcement agencies. The presence of safeguards to protect the confidentiality of drug testing results and a rehabilitative rather than penal purpose have been important factors to other courts determining the constitutionality of various drug testing programs.[232]

Confidentiality requirements with respect to a student's or employee's involvement with drugs may also be imposed by federal or state statutes. For example, the Family Education Rights and Privacy Act[233] generally restricts the information that a school district may release from student records to directory-type information. The Hatch Amendment[234] may also affect a school district's efforts to detect and respond to student drug use. The regulations promulgated pursuant to the Hatch Amendment require parental permission before federal fund recipients may subject students to certain kinds of "psychological and psychiatric testing." With regard to employees, many states have statutes protecting employees right to privacy and restricting disclosure of medical and other information.

Closely related to confidentiality issues is the common law protection against defamation.[235] An employer risks a defamation action when it makes an unprivileged disclosure of the results of a less-than-totally-ac-

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[231]608 FSupp. 1151, 1159 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986) *citing*, Whalen v. Roe, 429 U.S. 589, 608-09 (1977).

[232]*See, e.g.*, Schaill v. Tippecanoe County School Corp., 679 FSupp. 833 (N.D. Ind. 1988); American Federation of Govt. Employees AFL-CIO v. Dole, 670 FSupp. 445 (D.D.C. 1987).

[233]20 U.S.C. § 1232g.

[234]20 U.S.C. § 1232(h).

[235]Portions of the following discussion of defamation and employer liability with regard to safe school environment and intoxicated employees have been excerpted from Bittle, E., "Drug Testing" 44-47 as reprinted in *School Law in Review-1987* (NSBA 1987). Original printed at 36 West's Educ. L. Rep. 1067. Reprinted here with permission.

curate interpretation of a drug test or of an individual's alleged or suspected, but unproven, drug or alcohol abuse.[236]

As a defense to disclosures of false results, a school district could assert, if appropriate, the qualified privilege of corresponding interests. This privilege has been described as follows:

> A qualified or privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. The transmitter must have an interest or duty in the subject matter, and the addressee must have a corresponding interest or duty, that such duty may be moral or social, rather than a legal one.[237]

In *Ledl v. Quick Pik Food Stores*,[238] a Michigan appellate court rejected a plaintiff's defamation claim because the employer had a qualified privilege to disclose the allegedly false reasons for plaintiff's discharge to the state employment security commission and to a prospective employer. The court found that the employer and these parties had corresponding interests, thus giving rise to the privilege.

However, school districts should use caution when reporting the results of drug or alcohol tests and severely restrict information regarding test results. Caution should also be exercised in disclosing that a drug test has even been performed. Revealing that an individual is suspected of drug use creates an implication which could amount to an invasion of the employee's privacy interests. Thus, school districts should not disclose the identities of individuals who were tested for drug use.

## LIABILITY

In addition to the potential areas of liability discussed above, an employer may also face liability under the following theories.

### *Duty to Provide a Safe School Environment*

An issue of increased judicial comment is a student's right to a safe school environment.[239] The United States Supreme Court has discussed

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[236] *See, e.g.*, O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986); *Houston Belt and Terminal Railway v. Wherry*, 548 S.W.2d 743 (Tex. App. 1977).

[237] 50 Am. Jur. 2d, *Libel and Slander*, § 195 at 698-700.

[238] 349 N.W.2d 429 (Mich. App. 1984).

[239] *See* Ullman, "After T.L.O.: Civil Liability for Failure to Control Substance Abuse?" 24 Educ. L. Rptr. 1099 (1985); Nicholson, Rapp, and Carrington, "Campus Safety: A Legal Imperative," 33 Educ. L. Rptr. 981 (1985).

the student's interest in a safe learning environment in three recent cases addressing students' constitutional rights.

The United States Supreme Court in *New Jersey v. T.L.O.*, commenting on the relationship between the student and the school and noting the difficulty in maintaining discipline in the public schools today, stated that:

> . . . [m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems . . .
>
> . . . maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures and we have respected the value of preserving the informality of the student-teacher relationship.[240]

Justices Powell and O'Connor, in their concurring opinion, also observed that "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment from other children."[241]

School districts have an obligation, often set forth in a statute, to prescribe rules for discipline and expulsion so that students will be aware that specific behavior will be met with specific punishment. Schools should enforce these rules or face potential liability for not taking reasonable steps to protect the student in the school environment.

The United States Supreme Court in *Bethel School District No. 403 v. Fraser*,[242] in upholding discipline of a student for delivering a lewd speech at school, further commented on the role and purpose of the American public school system. The Court observed that the objective of the public school system is to inculcate the "fundamental values" necessary to the maintenance of a democratic political system.

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account considerations of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.[243]

The Court held that the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

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[240] *T.L.O.*, 469 U.S. at 339-40.

[241] *Id.* at 350 (Powell, J., concurring).

[242] 106 S.Ct. 3159 (1986).

[243] *Id.* at 3164.

The Court further observed that the process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class. Instead, the court held that schools must teach by example, the shared views of a civilized social order.

> Consciously or otherwise, teachers—and, indeed, the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged by this confused boy.[244]

The Court concluded that the school board should have the authority to determine what speech in the classroom or in the school assembly is inappropriate. The Supreme Court reiterated this position in *Hazelwood School District v. Kuhlmeier*[245] regarding the school board's "authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ."

The language of these opinions, combined with a school's common law statutory obligation to promulgate and enforce rules of student conduct, may require a school to enforce its disciplinary rules or face liability. As stated by the California Supreme Court:

> The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the mental and physical well-being of the students. The school premises, in short must be safe and welcoming.[246]

### *Duty to Control Intoxicated Employees*

Another area of liability to employers is off-duty conduct of an employee who leaves the work place while intoxicated. Employers can be held responsible if they allow an intoxicated employee to drive home. Courts have treated the drunk employee as a dangerous instrumentality under the control of the employer, and impose on employers the duty to exercise reasonable care in directing the employee's actions.

In *Otis Engineering Corp. v. Clark*,[247] a supervisor sent home an employee who appeared to be intoxicated. While driving home, the intoxicated employee was involved in a traffic accident in which two people were killed. The employee, who had a history of drinking on the job, had a blood alcohol content of 0.268% at the time of the accident.

The Texas Supreme Court in holding that the victims' husbands could bring a wrongful death action against the employer, noted that while a

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[244] *Id.* at 3165.

[245] 108 S.Ct. 562, 570 (1988).

[246] People v. William G., 40 Cal.3d 550, 221 Cal. Rptr. 118, 709 P.2d 1287 (1985).

[247] 668 S.W.2d 307 (Tex. 1983).

person is generally under no legal duty to come to the aid of another in distress, a person who voluntarily enters an affirmative course of action affecting the interests of another must do so with reasonable care. The court announced the following standard to govern an employer's conduct:

> When, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty may be analogized to cases in which a defendant can exercise some measure of control over a dangerous person when there is a recognizable great danger of harm to third persons.[248]

Since the employer had exercised control over the employee by sending him home because of his intoxicated condition, the employer had assumed a duty to take reasonable precautions to prevent the intoxicated employee from causing an unreasonable risk of harm to others.

In *Brockett v. Kitchen Boyd Motor Co.*,[249] the California Court of Appeals permitted an employer to be held liable for injuries sustained in an automobile accident caused by an intoxicated employee. The employee, Huff, became intoxicated at a prolonged Christmas party given by the employer. Huff, whom the court found was "grossly intoxicated," was placed in his automobile and told to drive home. On his way home, he collided with another automobile stopped at a traffic light. The court held that the employer's affirmative acts of placing Huff in his car and directing him to drive home imposed a duty upon the employer to exercise reasonable care.

In *Robertson v. LeMaster*,[250] the West Virginia Supreme Court of Appeals held that a cause of action could be maintained against an employer for permitting an employee who had just worked twenty-seven consecutive hours to drive to his home fifty miles away. LeMaster, the employee, fell asleep while driving home and collided with the plaintiff's car. The court held that the employer could be held liable if its act of permitting LeMaster to drive home created a foreseeable risk of harm to others.[251]

Thus, it is apparent that courts may hold an employer responsible for the consequences if an intoxicated employee is allowed or ordered to drive home. Employers should exercise care when sending an employee from work because of the employee's present state of intoxication.

### *Negligence*

Claims based on the duty to control employees may be framed in terms of negligent supervision. School districts may be subject to other negli-

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[248] *Id.* at 311.

[249] 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (Cal. App. S.D. 1968).

[250] 301 S.E.2d 463 (W.Va. 1983).

[251] *Id.* at 467.

gence claims with regard to their efforts to detect and eradicate drug use by students and employees. Claims of negligent hiring may be asserted where states place upon employers a duty to use reasonable care in the selection of employees.[252] Many states also now require districts to conduct criminal background checks of new employees. While such checks may not turn up any evidence of involvement with drugs or alcohol abuse, a district's failure to conduct the background investigations thoroughly may bolster claims of negligent hiring. On the other hand, employers must also be aware of anti-discrimination laws which may affect hiring decisions.

Other negligence issues which might be raised relate to the manner in which a school district carries out a drug testing program. Unless proper procedures are followed, negligence may be alleged with regard to the collection and handling of urine specimens and the selection of the laboratory actually performing the initial urinalysis and confirmatory tests. (*See* discussion of test reliability and chain of custody, *supra,* at 53–55). Such issues may have important implications in the disciplining of students or employees charged with drug-related infractions.

### *Wrongful Discharge*

If a school decides to use drug testing, it should be wary of discharging an employee for refusing to submit to urinalysis or for positive results from a test administered without cause. In addition to the constitutional claims, such situations may invite suits for wrongful discharge by employees seeking damage awards and injunctive relief. Wrongful discharge actions which seek exception to the employment at will doctrine do so on the basis of a number of theories, including discharge as a violation of public policy or breach of an implied employment contract.[253] Such theories may be applicable to discharge based on refusal to submit to or failure of a drug test.

## COLLECTIVE BARGAINING

School districts subject to collective bargaining laws may find that they cannot unilaterally impose a drug testing program on employees, but must submit the matter to the collective bargaining process as a mandatory topic under the rubric "terms and conditions of employment."[254]

Once a union agrees to a drug testing program, grievances may be filed on behalf of employees disciplined on the basis of a positive test result.[255] The U.S. Supreme has recently ruled that where the terms of the

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[252] *See* Colwell v. Oatman, 32 Colo. App. 171 510 P.2d 464 (1973).

[253] *See* Hanks, J. "Employment at Will," *School Law Seminar Proceedings 1984* (NSBA 1984).

[254] *See* International Brotherhood of Electrical Workers, Local 1900 v. PEPCO, 634 ESupp. 642 (D.D.C. 1986).

[255] *See* Denenberg, T.S. & Denenberg, R.V., "Drug Testing from the Arbitrator's Perspective," 11 Nova L. Rev. 371 (1987); Mehlsack, B. "Drug Testing as an Arbitral Issue," 40 N.Y.U. Conf. Lab. 4.1 (1987).

collective bargaining agreement call for submission of grievances to binding arbitration, a federal court cannot reconsider the merits of an arbitrator's award absent fraud and dishonesty. *United Paperworkers Intern. Union v. Misco, Inc.*[256] *Misco* involved the dismissal of an employee based on his presence in an automobile in which police had found a lit marijuana cigarette and marijuana smoke. The arbitrator found that the company had failed to prove that the employee had possessed or used marijuana on company property and ordered that the employee be reinstated with back pay and full seniority. The district court set aside the arbitrator's decision as contrary to public policy since the employee operated dangerous machinery as part of his job. The court of appeals agreed with the lower court, but the Supreme Court found that the Fifth Circuit exceeded its authority. The High Court admonished that a court may not overturn an arbitrator's decision that applies or interprets a contract term simply because the court disagrees with the arbitrator's factual findings, contract interpretation or choice of remedies. A court may reverse such a decision on public policy grounds only where it can clearly show a violation of "some explicit public policy... ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. (citations omitted)"[257]

Although this case concerned the scope of authority of federal courts to reverse an arbitrator's decision made pursuant to a collective bargaining agreement between a private employer and a labor union, the Court's rationale focused on the doctrine of non-interference with contractual agreements between parties, a doctrine equally applicable to public employers. Although the Court stated that the reasons insulating arbitral decisions from judicial review are grounded in federal statutes regulating labor management relations (which generally do not apply to school districts), state courts often follow federal labor law decisions in interpreting their own rules.

## CONCLUSION

> The threat posed by the widespread use of drugs is real and the need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections. ... even a reduction in the use of drugs is not worth a reduction in our most cherished constitutional rights.[258]

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[256] 108 S.Ct. 364 (1987).

[257] *Id.* at 373.

[258] *Capula*, 643 FSupp at 1522.

# Appendices

The policies, forms, letters and outlines contained in the following appendices are provided as samples only. They should not be considered models to be used verbatim. Each school district should develop its own policies consistent with federal and state law and should consult competent professionals as necessary.

## APPENDIX A

## SAMPLE

## SCHOOL SEARCH AND SEIZURE POLICY

To maintain order and discipline in the schools and to protect the safety and welfare of students and school personnel, school authorities may search a student, student lockers or student automobiles under the circumstances outlined below and may seize any illegal, unauthorized, or contraband materials discovered in the search.

A student's failure to permit searches and seizures as provided in this policy will be considered grounds for disciplinary action.

### PERSONAL SEARCHES

A student's person and/or personal effects (e.g., purse, book bag, etc.) may be searched whenever a school authority has reasonable suspicion to believe that the student is in possession of illegal or unauthorized materials.

If a pat down search of a student's person is conducted, it will be conducted in private by a school official of the same sex and with an adult witness present, when feasible.

If extreme emergency conditions require a more intrusive search of a student's person, such a search may only be conducted in private by a school official of the same sex, with an adult witness of the same sex present, and only upon the prior approval of the Assistant Superintendent for Student Services or one of his superiors, unless the health or safety of students will be endangered by the delay which might be caused by following these procedures.

### LOCKER SEARCHES

Student lockers are school property and remain at all times under the control of the school; however, students are expected to assume full responsibility for the security of their lockers. Periodic general inspections of lockers may be conducted by school authorities for any reason at any time without notice, without student consent, and without a search warrant.

### AUTOMOBILE SEARCHES

Students are permitted to park on school premises as a matter of privilege, not of right. The school retains authority to conduct routine patrols of student parking lots and inspections of the exteriors of student automobiles on school property. The interiors of student vehicles may be inspected whenever a school authority has reasonable suspicion to believe that illegal or unauthorized materials are contained inside. Such patrols and inspections may be conducted without notice, without student consent, and without a search warrant.

## SEIZURE OF ILLEGAL MATERIALS

If a properly conducted search yields illegal or contraband materials, such findings shall be turned over to proper legal authorities for ultimate disposition.

### Legal References:

State v. F.W.E., 360 So. 2d 148 (Fla. App. 1978), Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981), State v. D.T.W., 425 So. 2d 1383 (Fla. App. 1983).

## APPENDIX B

## SAMPLE

## STUDENT RIGHTS AND RESPONSIBILITIES INTERROGATIONS AND SEARCHES

Students shall be free from unreasonable search and seizure by school officials. School officials may search a student or a student's property with a search warrant, reasonable or probable cause, or the student's consent. U.S. Constitution Amend. IV.; Jones v. Latexo ISD, 499 F. Supp. 223 (E.D. Tex. 1980); M.M. v. Anker, 607 F.2d 488 (2d Cir. 1979); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

### SEARCHES OF PLACES

Areas such as lockers, which are owned and jointly controlled by the District, may be searched if reasonable cause exists to believe that contraband is inside the locker. Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

As the intrusiveness of the search intensifies, the standard needed for a reasonable search approaches probable cause. More intrusive searches, and those presenting greater possibilities of abuse, shall require search warrants. Horton v. Goose Creek ISD, 677 F.2d 471 (5th Cir. 1982).

### SEARCHES OF STUDENTS

Searches of students' outer clothing and pockets may be conducted if reasonable cause exists. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).

Highly intrusive invasions of a student's privacy, such as searches of the student's person, shall be conducted only if probable cause exists to believe that the student possesses contraband. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980); M.M. v. Anker, 607 F.2d 488 (2d Cir. 1979).

### POLICE INVOLVEMENT

If law enforcement authorities are involved in the search, the search shall be conducted under criminal law standards rather than under the provisions of this policy. Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

### STUDENT CONSENT

If the District does not have a warrant or reasonable or probable cause to search a student or his property, the District may search with the student's free and voluntary consent. However, consent obtained through threat of contacting the police authorities is not considered to be freely and voluntarily given. Jones v. Latexo ISD; Cormier v. Hardin-Jefferson ISD, Comm. of Ed. Dec. (1981).

## APPENDIX C

## SAMPLE

## SEARCH OF PROPERTY AND STUDENTS

### APPLICATION OF POLICY

Students are entitled to the guarantees of the fourth amendment, and they are subject to reasonable searches and seizures. School officials are empowered to conduct reasonable searches of students and school property when there is reasonable cause to believe that students may be in possession of drugs, weapons, alcohol and other materials ("contraband") in violation of school policy or state law. Students who bring contraband on to school grounds may be searched in order to secure the school environment so learning can take place and to protect other students from any potentially harmful effects stemming from the contraband. School property shall remain under the control of school officials, and shall be subject to search. The Administration may utilize canines and metal detectors (magnetometers) as provided in the Administrative Procedures.

### DEFINITIONS

For purposes of policy and these administrative procedures, the following definitions are applicable.

*"Contraband"* is all substances or materials, the presence of which is prohibited by school policy or state law, including but not limited to, controlled substances, drugs, alcohol or alcoholic beverages, abusable glue or aerosol paint, guns, knives, weapons and incendiary devices.

*"Reasonable cause"* is the standard for a search on school property or at school related events which is based on the school official's specific reasonable inferences which he or she is entitled to draw from the facts in light of the school official's experience. Specific reasonable inferences may be drawn from instances including but not limited to, a tip from a reliable student, suspicious behavior which suggests that contraband is present, a smell indicating the presence of the contraband or a bulge in a pocket, etc. Reasonable cause should not be based on mere hunch.

### SCHOOL PROPERTY

Student lockers, desks and other such property are owned by the school. The school exercises exclusive control over the school property, and students should not expect privacy regarding items placed in school property because school property is subject to search at any time by school officials. Students are responsible for whatever is contained in desks and lockers issued to them by the school.

## AUTOMOBILES

Automobiles on school property are subject to search by a school official if a school official has reasonable cause to believe that contraband is in or on the automobile.

## THE PERSON

Students and their effects are subject to being searched by school officials if a school official has reasonable cause to believe that the student is in possession of contraband.

## SUGGESTED PROCEDURES

If a school official has reasonable cause to believe that contraband is present he or she may institute a search. Although the following procedures for a search are suggested they are not mandated because the circumstances attendant to the need for each search may vary. The student should ordinarily be required to be present and asked to consent to the search. If after being informed of the basis for the school official's reason to search the student does not consent and the circumstances permit, the student's parent or guardian should be called and informed of the circumstances. If the parent or guardian will not consent to the search, the school official may proceed with the search, contact security, or if necessary call law enforcement authorities. Ordinarily, and if circumstances permit, the search of a person or his or her effects should be conducted out of the presence of other students.

## USE OF CANINES

The Administration is authorized to utilize canines whose reliability and accuracy for sniffing out contraband had been established to aid in the search for contraband in school owned property and automobiles parked on school property. Canines shall not be used to search students unless school officials have established independently that there is reasonable cause to believe the student possesses contraband on his or her person. The canines must be accompanied by a qualified and authorized trainer who will be responsible for the dog's actions. An indication by the dog that contraband is present on school property or an automobile shall be reasonable cause for a further search by school officials.

## USE OF METAL DETECTORS (MAGNETOMETERS)

Weapons of any nature on school property or at school functions are prohibited by school policy and state law. The presence of weapons is inherently dangerous to all persons in the school setting. When the Administration has reasonable cause to believe that weapons are in the possession of unidentified students, when there has been a pattern of weapons found at school or when violence involving weapons has occurred at a school, the Administration is authorized to use stationary or mobile metal detectors.

If a metal detector is to be used in a particular school, the students will be notified via the loudspeaker, at an assembly, or by similar means of its use. On the day of its use signs will be posted to warn students that each student will be required to submit to a screening for metal as a condition of entering or continuing attendance at school.

When a metal detector is being used students will be allowed to use only the entries designated. If a metal detector activates on a student, the student should be asked to remove metal objects from his or her person and walk through or be scanned again. If, after the removal of other metal objects and a third activation by the metal detector on the student, the student should be taken to a room out of view from the other students where the procedures suggested above for a search would be applicable.

**NOTICE**

Students will be provided notice of the Policy and Administrative Procedures concerning search and seizure by having them placed in the student handbook or distributed by supplemental publication. A copy of the Policy and Administrative Procedures will also be posted in the principal's office or another prominent place in each secondary school. If a metal detector is to be used, the additional notices required for its use will be given.

## APPENDIX D

## SAMPLE

## ACKNOWLEDGEMENT CONCERNING USE OF STUDENT PARKING LOTS

I acknowledge and understand that:

1. Students are permitted to park on school premises as a matter of privilege, not of right;
2. The School System retains authority to conduct routine patrols of student parking lots and inspections of the exteriors of student automobiles on school property;
3. The School System may inspect the interiors of student automobiles whenever a school authority has reasonable suspicion to believe illegal or unauthorized materials are contained inside the automobiles;
4. Such patrols and inspections may be conducted without notice, without student consent, and without a search warrant; and
5. If I fail to provide access to the interior of my car upon request by a school official, I will be subject to school disciplinary action.

Student

Date

## SAMPLE

## ACKNOWLEDGEMENT CONCERNING USE OF STUDENT LOCKERS

I acknowledge and understand that:

1. Student lockers are the property of the School System;
2. Student lockers remain at all times under the control of the School System;
3. I am expected to assume full responsibility for my school locker; and
4. The School System retains the right to inspect student lockers for any reason at any time without notice, without student consent, and without a search warrant.

Student

Date

Locker Number

## APPENDIX E

## SAMPLE

## ALCOHOL AND DRUG POLICY

No student shall possess, use, transmit or be under the influence of any narcotic drug, hallucinogenic drug, amphetamine, barbituate, marijuana or any other controlled substance, or any alcoholic beverage, malt beverage or fortified wine or other intoxicating liquor, or possess, use, or transmit drug paraphernalia or counterfeit drugs, or possess, use, transmit or be under the influence of any other chemicals or products with the intention of bringing about a state of exhilaration or euphoria or of otherwise altering the student's mood or behavior.

This policy shall apply to all students before, during and after school hours at school, in any school building and on any school premises; on any school-owned vehicle or in any other school-approved vehicle used to transport students to and from school or school activities; off school property at any school-sponsored or school-approved activity, event or function; or during any period of time when students are subject to the authority of school personnel.

This policy shall not apply to the proper possession and use of prescription medication or to the legal possession of any of the above-listed substances in connection with an approved school project.

# SAMPLE

# DRUG AND ALCOHOL POLICY*

## REASON FOR POLICY

Because the use of drugs, alcohol, and other chemicals among young people has become a major problem in our country and because the use and availability of these substances on school campuses interfere with the educational process, this policy is being adopted and implemented. The policy is designed to help eradicate the influence of drugs, alcohol, and other chemicals within the school environment. It is designed to act as punishment, deterrent, and protection for the students.

## WHEN AND WHERE APPLICABLE

This policy applies to any student who is on school property, who is in attendance at school or at a school sponsored activity or whose conduct at any time or in any place interferes with or obstructs the missions or operations of the school district or the safety or welfare of students or employees.

## PROHIBITED ACTIVITIES

It shall be against school policy for any student:

1. To sell, supply or give, or attempt to sell, supply, or give to any person any of the substances listed in this policy or what the student represents or believes to be any of the substances listed in this policy.

2. To possess, procure or purchase, to attempt to possess, procure or purchase, to be under the influence of (legal intoxication not required), or to use or consume, or attempt to use or consume, the substances listed in this policy or what is represented by or to the student to be any of the substances listed in this policy or what the student believes is any of the substances in this policy.

## PROHIBITED SUBSTANCES AND PENALTIES**

Any student engaging in the prohibited activities listed above with respect to the following prohibited substances shall be subject to the penalties set out below:

---

* This policy is designed to conform to Texas law. It will need to be modified to fit different circumstances and statutory provisions.

** Some districts find it helpful to state the penalty for each offense while others state the range of possible penalties. If the substances listed in paragraph 4 are included in a policy, the possible penalties should provide for less stringent punishments than in paragraphs 1 through 3.

1. Alcohol or any alcoholic beverage.
   Penalty: 1st offense: *(state)*
   Any subsequent offense: *(state)*

2. Any controlled substance or dangerous drug as defined by (cite applicable state law on controlled substances) or as defined by Section 812, Schedules I-V, of Title 21, United States Code, Section 801, *et seq.*, including but not limited to marijuana, any narcotic drug, any hallucinogen, any stimulant, or any depressant.
   Penalty: 1st offense: *(state)*
   Any subsequent offense: *(state)*

3. Any abusable glue or aerosol paint as defined by (cite applicable state law) or any other chemical substance, including but not limited to, lighter fluid and reproduction fluid, for inhalation.
   Penalty: 1st offense: *(state)*
   Any subsequent offense: *(state)*

4. Any prescription or non-prescription drug, medicine, vitamin or other chemical including, but not limited to aspirin, other pain relievers, stimulants, diet pills, multiple or other type vitamins, pep pills, "no-doze" pills, cough medicines and syrups, cold medicines, laxatives, stomach or digestive remedies, depressants and sleeping pills not taken in accordance with the authorized use policy.
   Penalty: 1st offense: *(state)*
   2nd offense: *(state)*
   Any subsequent offense: *(state)*

## AUTHORIZED USE

Any student whose parent or guardian requests that he or she be given any prescription or non-prescription medicine, drug, or vitamin shall follow the procedures of Policy (state reference) which requires that the school nurse dispense such medicine, drug, or vitamin to the student.

## APPENDIX F

## SAMPLE

## INVESTIGATIONS AND ARRESTS BY POLICE

Police may be called to the schools at the request of the school administration. If the police wish to come to a school for official business, they first must contact the school administration. Contact between the school and the police department on matters involving students shall be made through the office of the principal or superintendent and the officer of the police department.

The police have ample opportunity to talk to a student away from the school and before or after school hours. They should be encouraged to do so. Law enforcement authorities should be allowed to conduct an interview in the school only if they can show that special circumstances exist or if the interview is to be conducted at the request of the school. This determination should be made by the principal or superintendent. Circumstances where the health, life or safety of the child are at risk if the interview were conducted at home would come within this category, *i.e.*, child abuse, etc.

Throughout this process, all attempts should be made to avoid embarrassing the student before his teachers and peers and to avoid disrupting the educational program of the student and the school.

A. If the police have a warrant for the student's arrest, they must be permitted to arrest the student; however, whenever possible the arrest should be conducted in the principal's office out of the view of other students. Before removing a student from school, the police shall sign a release form in which they assume full responsibility for the student.

B. Law enforcement personnel should not be allowed to roam about the school until the student is found. They should remain in the administration office while school personnel seek out the student.

C. If possible, the educational program of the student should not be disrupted to allow for police questioning of the student during class time.

D. Any questioning by police, if allowed, should be conducted in a private room or area where confidentiality can be maintained. This should be an area removed from observation by or contact with other pupils and school personnel.

E. If law enforcement officials are to be allowed to question a student under the age of eighteen, a reasonable attempt shall be made to notify the parents except in cases of suspected child abuse or child ne-

glect involving the parent. The parents should be given the opportunity to come to the school prior to the questioning.*

F. If the parents are notified and able to attend, they should be allowed to be present at the interview. The school administrator should be present at the interview, but should not take part in any questioning. The administrator should at all times remain a neutral observer.

Source: Wake County, N.C.

* Some state statutes require that a juvenile in custody must be advised prior to questioning of his *Miranda* rights and his right to have a parent or guardian present during questioning. *See, e.g.*, N.C. Gen. Stat. § 7A-595.

## APPENDIX G

## SAMPLE

## STUDENT DISCIPLINE: SUSPENSIONS

### GROUNDS

A student may be suspended from school when the student:

1. Violates District or school policies or regulations. These policies and regulations apply to any student who is on school property, who is in attendance at school or at any school sponsored activity or whose conduct at any time or any place interferes with or obstructs the missions or operations of the school district or the safety or the welfare of students or employees.[1]

2. Is guilty of conduct which interferes with the maintenance of school discipline.

3. Is guilty of conduct which, in the judgment of school officials, warrants the reasonable belief that disruption of school operations will likely result.

4. Is guilty of incorrigible conduct, including insubordination, disorderliness, viciousness, immorality, persistent violation of school rules, or persistent misbehavior.

A suspension shall not extend beyond the current term of school. "Current term" means the period beginning with the first day of scheduled inservice training and ending with the first day of scheduled inservice training the following year.[2]

### PRINCIPAL'S RESPONSIBILITY TO MAINTAIN ORDER

Principals are charged with the responsibility of general student conduct and behavior regulations. Such discipline may include suspension from school. The Principal or Assistant Principal shall notify the parent prior to sending the student home during the school day. If the parent cannot be contacted, the student shall be kept at school until the end of the school day. A letter explaining the suspension will be sent home with the student at the end of the school day. A letter shall also be sent to the parent or guardian by mail. (*See* Appendix "I", Specimen Letter # 1). (Exception: If the student's continued presence in the school presents a dan-

---

[1] **This policy contemplates that another policy or policies will contain a listing of specific behaviors, e.g., destruction of school property or the property of students, assault of a school employee or another student, etc. If this is not included in other policies, the listing shall be included here.**

[2] **This policy is based on Texas law. Other states may have different laws regarding grounds for suspension, length of suspension, etc. Local policies should be modified accordingly.**

ger to the student or to other persons or property, the student may be summarily suspended from the campus without parent notification.)

## PROCEDURES

In the event a student faces suspension, one of the following procedures shall be used:

- **Short-Term Suspension: ( 10 School Days or Less )**

1. The Principal or Assistant Principal shall advise the student orally or in writing of the charges.

2. If the student denies the charges, the Principal or Assistant Principal shall explain the evidence against the student and give the student an opportunity to present the student's side of the story.

3. If, on the basis of this discussion, the official believes the student is guilty of the misconduct charged, and that suspension is the appropriate punishment under the circumstances, the Principal or Assistant Principal may suspend the student for ten school days or less.

In such cases, the Principal or Assistant Principal shall inform the Superintendent of the circumstances and action taken.

- **Long-Term Suspension ( More Than 10 School Days )**

Where the alleged misconduct of a student would, if proved, warrant a suspension of more than ten school days, or the remainder of the school term, the following procedure shall be provided prior to the suspension:

1. Prior to the hearing outlined below, the student may be suspended for up to 10 days if the procedures for a short-term suspension are followed.

2. *Notice of Charges*: The student[1] and the student's parent or guardian shall be notified in writing of the specific charges against the student. These charges must be stated clearly enough for the student and the parent to understand the grounds of the charges and to be able to prepare a defense. (*See* Appendix "I", Specimen Letter #2).

3. *Notice of Nature of Testimony and Witnesses*: If a hearing is requested, the student and the student's parent or guardian shall be advised of the nature of the evidence against the student and be provided the names of any witnesses whose testimony may be used against the student. (*See* Appendix "I", Specimen Letter #3).

4. *Notice of Hearing*: If a hearing is requested the student's parent or guardian shall be notified of the date of a hearing to be held before

[1] **Sending the notices and letters to the student is optional. The specimen letters included show copies to the student.**

the Principal within a reasonable time after notice.[4] The date of the hearing may be advanced at the request of the student or postponed on the showing of reasonable grounds. (*See* Appendix "I", Specimen Letter #3).

5. *Notice of Right to Present Evidence*: At the time notice of the hearing is given to the student and the student's parent or guardian, they may present witnesses or documentary evidence to rebut the charges against the student. (*See* Appendix "I", Specimen Letter #3).

6. *Impartial Hearing*: The student is entitled to a hearing before an impartial Administrator. The school Principal shall conduct the hearing. If the Principal has had such involvement in the case that the Principal feels he or she cannot be fair and impartial, the Principal shall ask the Superintendent to appoint another Administrator to conduct the hearing. (*See* Appendix "I", Specimen Outline #4).

7. *Adult Representation*: The student, or his or her parent or guardian may be represented and/or assisted at the hearing by a lawyer or other adult. A parent or guardian who is unable to attend the hearing may designate another adult to assist the student in the parent's absence. Notification of the representative's identity shall be given in advance of the hearing, or the representative shall furnish evidence of appointment at the time of the hearing.

8. *Right to Present Evidence*: At the hearing the student, parent, attorney or adult representative shall have the right to present witnesses and documentary evidence to refute the charges.

9. *Suspension Order*: The decision shall be based exclusively on evidence presented at the hearing. If the evidence supports the charges against the student, a suspension order appropriate to the charges and the facts established may be issued. Written notice of the decision shall be sent promptly to the student, the parent, and the Superintendent's office. (*See* Appendix "I", Specimen Letter #5).

10. *Record*: The hearing shall be tape recorded.

11. *Reporting to Superintendent*: In the event any student is suspended from the District for more than 10 days, the Principal shall make a written report to the Superintendent outlining the facts established at the hearing and the action taken.[5]

12. *Appeals to the Superintendent*: The student and his or her parents or guardian shall have the right to appeal his or her suspension to the

[4] **The hearing should be held within ten days of the imposition of the short term suspension unless the parents agree to a postponement of the hearing.**

[5] **A copy of Specimen Letter #5 can be used to notify the Superintendent.**

Superintendent or his or her designee. The Superintendent must be notified of the desire to appeal within five school days after the Principal has rendered a decision. (*See* Appendix "I", Specimen Letter #6). The appeal to the Superintendent or his or her designee will be based upon the record made before the Principal (the tape recording of the hearing, correspondence and any other documents used at the hearing). That is, no new evidence shall be presented to the Superintendent unless good cause can be shown why it was not presented to the Principal. (*See* Appendix "I", Specimen Outline #7). The Superintendent shall render a decision within five school days after he or she receives the notice of appeal. (*See* Appendix "I", Specimen Letter #8).

13. *Appeals to the Board*: The student or his or her parent or guardian have the right to appeal the Superintendent's decision to the Board of Trustees. The Superintendent must be notified of the desire to appeal within five school days after his or her decision. The hearing before the Board shall be conducted as a new hearing in which any evidence may be presented. (*See* Appendix "I", Specimen Letter #9). The hearing shall be conducted in the same manner as the hearing before the Principal. The student and the Administration may agree to present the case to the Board on the basis of the record developed before the Principal and/or Superintendent. (*See* Appendix "I", Specimen Outline #10). The Board shall render its decision by a majority vote of those members in attendance. (*See* Appendix "I", Specimen Letter #11).

- **Action by Board When No Appeal**

If a student who is suspended for more than 10 school days does not appeal the suspension to the Superintendent or the Board, the Superintendent shall recommend to the Board that it enter an order suspending the student in accordance with the order of the Principal or Superintendent. (*See* Appendix "I", Specimen Order #12).

- **Summary Suspension**

Immediate suspensions of a student may be imposed by the Principal or the Superintendent without prior notice and hearing when the student's continued presence in school poses a continuing danger to the student or to other persons or property, or an ongoing threat of disruption of the academic process. In such cases the necessary notice of the date and place of the subsequent hearing shall be given to the student and to the parents or guardian of the student. Such hearing shall be held within ten days after the student's removal from school by the Principal or the Superintendent. The board may continue the Principal's or the Superintendent's summary suspension or take other action as the facts warrant.

## SUSPENSION OF HANDICAPPED STUDENTS[6]

- **Summary Suspension of Handicapped Students**

Handicapped students may be summarily suspended if they endanger themselves or others. A summary suspension is the immediate removal of the student from his or her regularly scheduled school program for a period not to exceed three school days. The summary suspension may be effected immediately upon the decision of the designated building administrator. The Administration must make and document efforts to contact and notify the parent prior to the suspension.

The student shall be given oral or written notice of the charges, an explanation of the evidence supporting the charges and an informal opportunity to respond to and rebut the charges.

The Admission, Review and Dismissal (ARD) Committee shall convene within the three school days of suspension to review the misbehavior and make any needed revisions in the individual education plan (IEP).

The District is not obligated to provide educational services during the time of summary suspension.

- **Short-Term Suspension of Handicapped Students**

A short-term suspension of 10 school days or less may be effected for a handicapped student for any conduct which would warrant short-term suspension for a non-handicapped student. (If a student has received summary suspensions and/or short-term suspensions totalling 11 days during any one school year, all subsequent suspensions will be handled under the policies governing long term suspensions). The ARD Committee must determine that the behavior in question was not related to the handicapping condition or a result of inappropriate placement before short-term suspension may be effected. No ARD Committee meeting will be required for those handicapped students for whom short-term suspension has been included in the Discipline Plan attached to their IEP's. In such cases, the IEP Discipline Plan will be implemented if the student has engaged in conduct for which the Discipline Plan allows short-term suspension. The student shall be given oral or written notice of the charges, an explanation of the evidence supporting the charges, and an informal opportunity to respond to and rebut the charges. The Administration will make and document efforts to notify the parent prior to the suspension. The ARD Committee will determine the nature and extent of services, if any, to be provided at home for students who receive short term suspension.

- **Long Term Suspension of Handicapped Students**

A long term suspension of 11 school days or more may be effected for a handicapped student under the following conditions only: Prior to long

[6] **A provision for the suspension of handicapped students which conforms with federal laws and guidelines and each state's law and procedures should be included. Those set out here are patterned after the rules in effect in the state of Texas.**

term suspension, the ARD Committee will meet to determine whether the misbehavior is related to the handicapping condition or is the result of inappropriate placement. The ARD Committee shall consider whether the behavior indicates the need for new assessment and evaluation data. If the ARD Committee determines that the misbehavior is related to the handicapping condition or is a result of an inappropriate placement, the handicapped student may not be suspended.

If no relationship or inappropriate placement is found, the suspension may be imposed only with the consent of the child's parent or guardian, by court order or if such action is part of a discipline plan in the child's current IEP or is determined to be appropriate after completion of the IEP, administrative hearing and appeal process. The ARD Committee shall determine the nature and extent of educational services to be provided during the time of suspension.

- **Short-Term and Long-Term Suspension of Handicapped Students**

Except for summary suspension procedures, a handicapped student shall remain in the current placement pending action on a suspension recommendation, unless the parents and the Administration agree otherwise. A handicapped student for whom long-term suspension has been recommended is entitled to all the due process rights available to a non-handicapped student for whom long-term suspension has been recommended. In addition, the handicapped student is entitled to all the due process procedures available to a handicapped student under the Education for All Handicapped Children Act and applicable state policies and procedures.

- **Suspension and Special Referral**

The District is not required to refer for special education assessment and evaluation a regular student who has been suspended for violation of school rules and district policy to determine if such a student might be handicapped. A suspended regular student is not entitled to reinstatement to classroom and campus privileges pending any assessment and evaluation which is to be made during the term of the student's suspension.

## ENROLLMENT OF SUSPENDED STUDENTS

Any student who has been suspended from a school of this District is not eligible to attend any other school within the District until eligible to return to his or her regular school. Any student who has been suspended from another district will not be permitted to enroll in this District until eligible to reenroll in his or her former district or until the Board or the Superintendent has reviewed the prior suspension and determines that the suspension was illegal or improperly given.

## APPENDIX H

## SAMPLE

## DISCIPLINE POLICY

The following activities are prohibited. Any student who engages in any of these activities is subject to discipline, which may include suspension for the remainder of the school year. This policy applies to any student who is on school property, who is in attendance at school or at a school sponsored activity or whose conduct at any time or in any place interferes with or obstructs the missions or operations of the school district or the safety or welfare of students or employees.

***

5. Violation of the district's drug and alcohol policy.

***

10. Violation of public criminal or civil law or District or building regulations.

***

## APPENDIX I

## SPECIMEN LETTERS, ORDERS AND OUTLINES

### Specimen Letter #1

**NOTICE OF SUSPENSION FOR UNDER 10 SCHOOL DAYS***

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*,

Your child, *(name)*, has been suspended from *(name)* School for *(number)* days for the following misconduct and/or violation of District or school rules or regulations:

*(Describe)*

Your child has had the charges of misconduct explained to him or her and has been given the opportunity to disagree with the charges and the suspension. It has been determined that your child committed the act(s) in question and should be suspended.

Your child may return to school on *(date)*. Make-up work (will) or (will not) be given for this time. While suspended, your child may not come on any school campus except with you for the purpose of discussing conduct. If you have any questions, please call.

Sincerely yours,

Principal

cc: The Superintendent

* This letter should be given to the student and sent by the Principal to the parents or guardians at the time the student is suspended. The parents should also be advised by telephone.

## Specimen Letter #2

### NOTICE OF PROPOSED SUSPENSION FOR MORE THAN TEN SCHOOL DAYS*

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Re: Proposed Suspension of
*(name)* from
*(name)* School

Dear *(Parent or Guardian)*,

I regret to inform you that your child, *(name)*, has been temporarily suspended from school pending a hearing to be conducted before me in the Principal's office. From the investigation, it was determined that your child was involved in the following misconduct and/or violation of District or school rules or regulations:

*(Describe)*

The proposed length of suspension is *(time)*.
Your child is entitled to a hearing to determine if he/she violated the rules in the manner stated above and whether he/she should be suspended for more than ten school days, not to extend beyond the current school term. If you desire a hearing, please notify the Principal's office at *(phone)* within five (5) days; that is, by (date). If you request a hearing, it will be scheduled as soon as praticable at a mutually convenient time. Your child will remain on temporary suspension until the hearing is held. If you do not request a hearing within five days, you will waive the right to a hearing, and the Principal will enter an order suspending your child for more than ten school days if he/she deems it appropriate.

Please be advised that at a hearing your child may be represented by you, another adult, or an attorney and may seek to refute any allegations of misconduct. If he/she is represented by someone other than yourself, please advise the Principal prior to the hearing.

At a hearing you and your child may present any witnesses or documentary evidence in an effort to refute the charges of misconduct and on the issue of a proper punishment, if it is determined that the misconduct occurred.

If you request a hearing, the School's Administration will provide you with a list of the witnesses who will testify on behalf of the Administra-

* **This letter should be sent by the Principal or other person serving as the hearing officer.**

tion, together with a short description of their testimony. Documents may also be used at the hearing. If so, the documents will be provided to you prior to the hearing.

A COPY OF THE SCHOOL DISTRICT POLICIES REGARDING DISCIPLINE PROCEDURES IS ATTACHED TO THIS LETTER. PLEASE REVIEW THESE POLICIES. If you have any questions regarding the reasons for the proposed suspension or anything connected with the hearing, please feel free to call me.

Sincerely yours,

_____

Principal or Hearing Officer

cc: The Student

## Specimen Letter #3

### NOTICE OF HEARING AND WITNESS LETTER (PRINCIPAL)*

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

You have requested a hearing concerning the proposed suspension of *(name)* from school for misconduct and/or violation of District or school rules or regulations, specifically, *(specific alleged misconduct)*.

Pursuant to your request, a hearing has been scheduled for *(month) (day), (year)* at *(time)* at *(location of hearing)*. If this time for the hearing is not convenient, please do not hesitate to let me know so it can be rescheduled.

At the hearing, you will have the right to present any documentary or other evidence and any witnesses to refute the charges of misconduct. You may also present evidence and witnesses with respect to a proper punishment if the student is found to have committed the alleged offense(s). The Administration may present the following witnesses:

1. *(Name of witness), (nature of testimony).*
2. *(Name of witness), (nature of testimony).*

If additional witnesses are to be called by the Administration, you will be notified as soon as possible. Rebuttal witnesses may also be presented by the Administration, but their identity and the nature of their testimony cannot be determined at this time. Documentary evidence may also be submitted. The documents which may be used *(are attached) (will be presented to you prior to the hearing)*.

The hearing will be conducted as an informal hearing, and no strict rules of evidence will apply. However, the testimony or documents must be relevant and not hearsay. The Principal will rule on any objections to the presentation of witnesses or evidence that may be made by you or by the Administration. The Administration's case in support of suspension will be presented by *(name), (title)* unless you have an attorney. You and your child may be represented by another adult or an attorney. If you are to be represented by an attorney, the school district's attorney will present the Administration's case. If you will have another adult or an attorney

* This letter must be sent by the Principal or Hearing Officer when a hearing or a proposed suspension in excess of ten school days is requested before the Principal or Hearing Officer.

represent your child, please let me know prior to the hearing so the school district's attorney can be present.

A COPY OF THE SCHOOL DISTRICT POLICIES REGARDING DISCIPLINE PROCEDURES IS ATTACHED TO THIS LETTER. PLEASE REVIEW THESE POLICIES. If you have any questions about the procedures to be followed at the hearing, the nature of the charges, or any other aspect of this matter, please do not hesitate to contact me.

Sincerely yours,

_____

Principal or Hearing Officer

cc: The Student

## Specimen Outline #4

### OUTLINE OF HEARING FOR STUDENT BEFORE THE PRINCIPAL OR HEARING OFFICER

PRINCIPAL OR HEARING OFFICER: Today we are here for a hearing in the case of *(name)*. *(Name)*, a *(classification)* grade student at the *(name)* School, is charged with *(describe)*. It is proposed that he/she be expelled from school for the remainder of the term (or other time).

Both the Administration and the student will be given an opportunity to present testimony with respect to the incident involved in this case, any circumstances attendant to it, and any punishment that might be rendered if it is determined that *(name)* committed the act(s) in question. This procedure may be handled in one or two parts. In the first stage, only the issue of whether the student committed the acts of which he/she is charged will be considered. I will then make a decision as to whether the student committed those acts. If the student is found to have committed the acts, then punishment will be considered. The alternative is that I can consider whether the student committed the misconduct and the punishment at the same time. *(Student's representative)* which way do you want to do it? (Decide which procedure will be followed).

*(Name)* is represented by an attorney *(name)*. The Administration will be represented by *(name)*. For the record, the following people are present:

*(list them)*

Each side will have a chance to present its witnesses and documentation in support of its position. This proceeding is being recorded to make a record of what transpires. The witnesses will be sworn in by *(name)*, a notary public. This will be conducted as an informal hearing, and no strict rules of evidence will apply; however, the testimony must not be hearsay, and it must be relevant. The attorneys may make such objections to testimony or documentation as they see fit and I, as Hearing Officer, will consider such objections.

As noted, the student is charged with *(describe)*. The student, through his parent, was notified of the charges and the time and date of this hearing. The Administration must show that the charges are supported by the evidence. The charges must be supported only by the evidence heard here today.

The Administration will present its case first, followed by the presentation of the student. Each of you may make a short opening statement if you wish.

*(Opening statement by the Administration's representative).*

*(Opening statement by the student's representative).*

PRINCIPAL OR HEARING OFFICER: *(Administration's representative)*, you may present your witnesses.

*(The Administration's representative presents witnesses).*

PRINCIPAL OR HEARING OFFICER: *(Student's representative)*, you may present your witnesses.

*(The student's representative presents witnesses).*

PRINCIPAL OR HEARING OFFICER: *(Administration's representative)*, do you wish to present any rebuttal evidence?

*(Presentation of rebuttal evidence by the Administration's representative).*

PRINCIPAL OR HEARING OFFICER: *(Student's representative)*, do you wish to present anything further?

PRINCIPAL OR HEARING OFFICER: Do either of you wish to make closing statements?

*(Closing by Administration's representative).*

*(Closing by student's representative).*

PRINCIPAL OR HEARING OFFICER: I will now deliberate upon the evidence I have heard and will render a decision as quickly as possible. *(The decision can be given verbally and followed up in writing, or the decision can be given in writing promptly after the hearing).*

## Specimen Letter #5

### NOTIFICATION OF THE PRINCIPAL'S OR HEARING OFFICER'S DECISION AND THE RIGHT OF APPEAL TO THE SUPERINTENDENT*

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

On *(date)*, a hearing was held regarding the alleged misconduct of *(name)*. Specifically, it was alleged that *(specific alleged misconduct)*. At the hearing, you were afforded the opportunity to present any documentary or other evidence and present witnesses to refute the charge(s) and evidence of misconduct and to present evidence concerning a proper punishment if the student was found to have committed the offense(s).

Based upon all the evidence presented, I have made the following findings:

*(Here specific findings of fact as to what happened should be listed).*

Furthermore, based upon my consideration of the offense(s) and all the other factors involved, the punishment shall be as follows:

*(Punishment to be administered).*

You have the right to appeal this decision to the Superintendent. If you desire such an appeal, please inform me or the Superintendent in writing within five (5) days from the date of this letter. A hearing will be scheduled as soon as practicable. The student will remain on suspension pending such a hearing. If you have any further questions concerning my decision, the procedures to be followed, or any other aspect of this matter, please do not hesitate to call me.

Sincerely,

_____
Principal or Hearing Officer

cc: The Superintendent



* If the Principal or Hearing Officer finds that the child is not guilty of the misconduct, a short letter to the parents and the student stating the finding should be written.

## Specimen Letter #6

### NOTICE OF HEARING BEFORE THE SUPERINTENDENT

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

You have appealed to me the decision of the Principal *(or Hearing Officer)* suspending your child *(name)* for the remainder of the term *(or other time)*. Accordingly, a hearing has been scheduled before me *(or designee's name)* for *(month)* *(day)*, *(year)* at *(time)* at *(location)*.

This hearing will be based upon the record made before the Principal *(or Hearing Officer)*. This record includes a tape recording of the hearing, correspondence, and any other documents used at the hearing before the Principal *(or Hearing Officer)*. No new evidence shall be presented at this hearing unless good cause can be shown why the evidence was not presented to the Principal *(or Hearing Officer)*.

Both you and the Administration will have an opportunity to present argument on the case. Since this is an appeal, you or your representative will go first, followed by a presentation by the Administration's representative.

The Administration's case will be presented by the Principal *(or Hearing Officer)* *(name)*, *(title)* unless you are represented by an attorney or another adult. In such case, the school district's attorney will present the Administration's case. Please let me know prior to the hearing whether you will be represented by an attorney or other adult so the school district attorney can be present if you are so represented.

If you have any questions about the procedures to be followed at the hearing, or the hearing in general, please do not hesitate to contact me.

Sincerely yours,

_____
Superintendent

cc: The Student

## Specimen Outline #7

### OUTLINE OF THE HEARING BEFORE THE SUPERINTENDENT

SUPERINTENDENT: Today we are here for a hearing in the case of *(name)*. *(Name)*, a *(classification)* grade student at the *(name)* School, who has been found by the Principal *(or Hearing Officer)* with *(describe)*. The Principal *(or Hearing Officer)* has ordered that he/she be expelled from school for the remainder of the term *(or other time)*.

This hearing will be based upon the record made before the Principal *(or Hearing Officer)*. This record includes a tape recording of the hearing, correspondence, and any other documents used at the hearing before the Principal *(or Hearing Officer)*. No new evidence shall be presented at this hearing before me unless good cause can be shown why the evidence was not presented to the Principal *(or Hearing Officer)*.

*(Name)* is represented by *(name)*. The Administration will be represented by *(name)*. For the record, the following people are present: *(list them)*.

Each side will have an opportunity to present argument on the case. This proceeding is being recorded to make a record of what transpires. Since this is an appeal from the decision of the Principal *(or Hearing Officer)*, the student will present his or her argument based on the record first. This presentation will be followed by the presentation of the Administration's representative. Do any of you have any questions on how the hearing is to be conducted?

SUPERINTENDENT: *(Student's representative)*, you may present your argument based upon the record.

*(The student's representative presents his or her argument based upon the record)*.

SUPERINTENDENT: *(Administration's representative)*, you may present your argument based upon the record.

*(The Administration's representative presents his or her argument based upon the record)*.

SUPERINTENDENT: *(Student's representative)*, you may now make any rebuttal argument.

*(The Student's representative makes rebuttal argument)*.

SUPERINTENDENT: I will now deliberate upon the argument I have heard as well as the record itself and render a decision promptly.

## Specimen Letter #8

### NOTIFICATION OF THE SUPERINTENDENT'S DECISION AND THE RIGHT TO APPEAL TO THE BOARD*

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

On *(date)*, a hearing was held in the appeal from the decision of the Principal *(or Hearing Officer)* concerning the suspension of *(name)*. At the hearing, you were afforded the opportunity to present argument based upon the record of the hearing developed before the Principal *(or Hearing Officer)*. The Administration's representative was then allowed to make argument on the record.

Based upon the evidence presented at the hearing before the Principal *(or Hearing Officer)* and the arguments made at the hearing before me, I have made the following findings:

*(Here specific findings of fact as to what happened should be listed).*

Furthermore, based upon my consideration of the offense(s) and all the other factors involved, the punishment shall be as follows:

*(Punishment to be administered should be stated).*

You have the right to appeal my decision to the Board of Education. If you desire to make such an appeal, please inform me in writing within five (5) days of the date of this decision. A hearing will be scheduled as soon as practicable. Your child will remain on suspension pending such a hearing. If you have any further questions concerning my decision, the procedures to be followed in an appeal, or other aspects of this matter, please do not hesitate to call me.

Sincerely yours,

_____
Superintendent

cc: The Student

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*** If the Superintendent determines that the student is not guilty of the misconduct, an appropriate letter should be prepared.**

## Specimen Letter #9

### NOTICE OF HEARING AND WITNESS LETTER (BOARD)

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

You have requested a hearing concerning the suspension of *(name)* from school for misconduct. This is an appeal from the decisions of the Principal *(or Hearing Officer)* and the Superintendent. A hearing before the Board has been scheduled for *(date)*, *(year)* at *(time)*, at *(location of hearing)*.

The hearing before the Board will be conducted in the same manner as the hearing before the Principal *(or Hearing Officer)*. The procedures outlined in the Principal's letter of *(date)* will be followed and the same witnesses listed in that letter may testify at the Board hearing on behalf of the Administration.* All the documents used at the Principal's hearing, as well as the correspondence and documents which have been sent during the appeals may be used at the Board hearing.

The Administration's case which supports the suspension will be presented by *(name)*, *(title)* unless you have an attorney. You or your child may be represented by another adult or an attorney. If your child is to be represented by an attorney, the school district's attorney will present the Administration's case. If you will have another adult or an attorney represent your child, please let me know prior to the hearing so the school district's attorney can be present.

If you have any questions about the procedures to be followed at the hearing, the nature of the charges, or any other aspect of this matter, please do not hesitate to contact me.

Sincerely yours,

_____
Superintendent

cc: The Student

* **If other witnesses are to testify, they and the nature of their testimony should be included.**

## Specimen Outline #10

### OUTLINE OF THE HEARING BEFORE THE BOARD

BOARD PRESIDENT: Today we are here for a hearing in the case of *(name)*. *(Name)*, a *(classification)* grade student at the *(name)* School, is charged with *(describe)*. The Principal *(or Hearing Officer)*, after the hearing, determined that he/she be expelled from school for the remainder of the term *(or other time)*. *(Name)* appealed to the Superintendent, and he/she also found that the student should be expelled from school for the remainder of the term *(or other time)*.

Both the Administration and the student will be given an opportunity to present testimony with respect to the incident involved in this case, any circumstances attendant to it, and any punishment that might be rendered if it is determined that *(name)* committed the acts as he/she is charged. This procedure may be handled in one or two parts. We may, in the first stage, consider only the issue of whether the student committed the acts as he/she is charged. We will then vote. If he/she is found to have committed the acts, then we will consider punishment. The alternative is that we can consider whether the student committed the misconduct and the punishment at the same time. *(Parent or attorney)*, which way do you want to do it? *(Decide which procedure will be followed)*.

*(Name)* is represented by *(name)*. The Administration will be represented by *(name)*. For the record, the following people are present: *(list them)*. Each side will have a chance to present its witnesses and documentation in support of its position. This proceeding is being recorded to make a record of what transpires. The witnesses will be sworn in by *(name)*, a notary public.

This will be conducted as an informal hearing and no strict rules of evidence will apply; however, the testimony must not be hearsay, and it must be relevant. The representatives of the parties may make such objections to testimony or documentation as they see fit and I, as the Board President, will consider such objections. The Board members may ask questions, but no questions may be asked of the Board members.

As noted, the student is charged with *(describe)*. Pursuant to the request by the student's representative, this hearing is being conducted in closed *(open)* session.* The Administration must show that the charges are supported by the evidence. The charges must be supported only by the evidence heard here today. I will now poll the Board to determine if each member can make a fair and impartial decision based only on the evidence heard tonight at this hearing. *(Ask each member)*.

The administration's representative will present his or her case first, followed by the presentation of the student's representative. *(This hearing*

* State law will control the question of whether hearings are open or closed and whether the vote must be taken in open session.

*will be a closed hearing, with any vote being taken in open session.)** Each of you may make a short opening statement if you wish.

*(Opening statement by the Administration's representative).*

*(Opening statement by the student's representative).*

BOARD PRESIDENT: *(Administration's representative)*, you may present your witnesses.

*(The Administration's representative presents witnesses).*

BOARD PRESIDENT: *(Student's representative)*, you may present your witnesses.

*(The student's representative presents witnesses).*

BOARD PRESIDENT: *(Administration's representative)*, do you wish to present any rebuttal evidence?

*(Presentation of rebuttal evidence by the Administration's representative).*

BOARD PRESIDENT: *(Student's representative)*, do you wish to present anything further?

*(Further presentation by the student's representative).*

BOARD PRESIDENT: Do either of you wish to make closing statements?

*(Closing by the Administration's representative).*

*(Closing by the student's representative).*

BOARD PRESIDENT: We will now deliberate upon the evidence we have heard and will render a decision as quickly as possible. (The Board would like to deliberate alone, i.e., without anyone present except the Board members. *(Student's representative)*, do you have any objection to that procedure? If you do, please say so and we will abide by it. Any vote will, as required by law, take place in open session).**

BOARD PRESIDENT: The Board will now deliberate. If the Board feels the charges are supported by the evidence, it may so find and the student be suspended or other appropriate measures taken.***

BOARD VOTE if the one step process is used.

*(Did not violate)*

A. I move that we find that *(name)* did not violate the district's rules as alleged and that he/she should not be punished; or,

---

** State law will control the question of whether the parties may agree to have the Board deliberate with only board members present.

*** If the Board uses the two step process in hearing evidence, the Board would first vote on the issue of whether the student is guilty of the charges. If so, the Board would then wish to take any further evidence concerning a proper punishment and vote again.

*(Did violate)*

B. I move that we find that *(name)* violated the district's rules as alleged and that he/she should be punished by *(describe)*.

BOARD VOTE if the two step process is used.

*(Did not violate)*

A. I move that we find that *(name)* did not violate the district's rules as alleged and that he/she should not be punished; or,

*(Did violate)*

B. Motion one. I move that we find that *(name)* violated the district's rules as alleged.

C. Motion two. I move that *(name)* be punished by being *(describe)*.

BOARD PRESIDENT: The parties will be promptly advised in writing of the decision. *(A letter should be prepared for the Board President's signature, such as specimen letter #11).*

## Specimen Letter #11

### SAMPLE LETTER NOTIFYING THE STUDENT OF THE BOARD OF EDUCATION'S DECISION AND THE STUDENT'S RIGHTS OF APPEAL TO THE STATE COMMISSIONER

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

On *(date)*, a hearing was held before the Board of Education regarding the alleged misconduct of *(name)*. Specifically, it was alleged that *(specific alleged misconduct)*.

At the hearing, you were afforded the opportunity to present any witnesses and to present any documentary or other evidence to refute the charge(s) and evidence of misconduct and to present evidence concerning a proposed punishment if the student was found to have committed the offense(s).

Based upon all the evidence presented, the Board voted as follows:

*(Action taken by Board: i.e., the Board found that the student did or did not commit the act(s) in question and what punishment, if any, was found appropriate).*

*(If a violation was found and punishment imposed, state law will determine whether further appeals may be taken. If the right to a further appeal does exist, then a conclusion similar to the following may be used:*

*You have the right to appeal this decision to _____. You must file such an appeal within _____ days of the date of the Board hearing. If you have any questions, please notify me or the Superintendent.)*

Very truly yours,

_____
Board President

cc: The Student

## Specimen Order #12

**ORDER OF THE BOARD AND NOTIFICATION OF THE DECISION OF THE BOARD WHERE NO APPEAL MADE TO THE BOARD**

*Hand Delivered or*
*Certified Mail*
*Return Receipt Requested*

*(Date)*

*(Parent or Guardian)*
*(Address)*

Dear *(Parent or Guardian)*:

On *(date)*, a hearing was held before the Principal *(or Superintendent)* regarding the alleged misconduct of *(name)*. The Principal *(or Superintendent)* found that *(name)* had violated the policies of the District as alleged and was suspended for the remainder of the term (or other time).

There was no appeal of the decision of the Principal *(or Superintendent)* to the Board, so the Superintendent recommended to the Board that it enter an order suspending the student in accordance with the order of the Principal *(or Superintendent)*. On *(date)*, the Board considered the recommendation of the Superintendent and entered an order suspending *(name)* for the remainder of the term (or other time).

This letter is notice to you of the action of the Board. If you have any questions concerning this action, please notify me or the Superintendent.

Sincerely yours,

_____

Board President

cc: The Student

## APPENDIX J

## SAMPLE

## EMPLOYEE ALCOHOLISM, DRUG ABUSE AND EMOTIONAL DISORDERS

*Policy Statement*

The Belle Fourche Area School District #9-1 recognizes chemical abuse and dependency and emotional problems as illnesses which may interfere with an employee's job performance.

Although the district's primary concern is job performance, it is recognized that employees experiencing chemical or emotional problems which interfere with job performance need aid in efforts toward recovery. It is intended that such problems be recognized and dealt with in a corrective manner. While treatment costs are the responsibility of the individual employee, the use of earned sick leave is to be granted for necessary treatment.

The underlying concept is regard for the employee as an individual as well as a productive employee.

Although inadequate job performance may place an employee's job security in jeopardy, the district's initial effort with regard to the aforementioned health problems will be directed toward recognition and treatment of such problems.

The Superintendent through the Building Principals or other Supervisory Director is responsible for the implementation of the program which effectively achieves the goals of this policy.

*General Procedures*

- **In Service**

The district through the Superintendent shall provide initial in-service direction to all administrators/supervisors to aid them in identifying chemical dependency and emotional problems. This in-service direction shall be repeated annually for all new administrators/supervisors.

- **Recognition of Chemical/Emotional Problems by Administrator/ Supervisor**

It shall be the responsibility of the immediate supervisor to be alert to employee job performance which is being affected by chemical or emotional problems. When such a problem is considered to exist, a conference between the supervisor and employee is to be arranged.

- **Follow Up**

If job performance continues to be unsatisfactory, the supervisor shall again meet in conference with the employee to seek satisfactory resolution. If satisfactory job performance cannot be achieved, the supervisor

shall review the situation with the Superintendent regarding his/her suspension/dismissal proceeding.

SOURCE: Belle Fourche SD#9-1
Belle Fourche, South Dakota
DATE: 6/8/82

## SAMPLE

## EMPLOYEE ASSISTANCE PROGRAM

The Community Unit School District No. 9 is pleased to announce that it has adopted an Employee Assistance Program as a practical and constructive aid to those employees and family members who voluntarily wish to use the program as a means of resolving a personal problem.

The program is being offered to all employees and their family members. To further the goals of the program, the District has solicited the joint program participation of those unions representing various employee groups.

1. The general purpose of the program is to assure that any employee having a personal problem will receive careful consideration and an offer of *confidential* professional assistance.

2. The decision to request or accept assistance through the Employee Assistance Program is the *personal choice of the individual*. Referrals will be designed on a self-referral, voluntary basis.

3. Many personal problems can be successfully dealt with and resolved provided assistance is offered at an early stage and assistance is sought from an appropriate form of care. This applies whether the problem is one of physical illness, mental or emotional illness, alcoholism, drug abuse, marital or family distress, financial or other concerns.

4. The records of the Employee Assistance Program will be maintained in the EAP office located at St. Elizabeth's Hospital. All records pertaining to the Employee Assistance Program will be treated with a high degree of confidentiality accorded to medical records. EAP records will not be disclosed to anyone other than the employee or family member involved, except under a court order compelling disclosure.

5. Voluntary, self-referred employees or family members seeking assistance will be able to do so with complete anonymity.

6. Expenses incurred for diagnosis and treatment of alcoholism, drug abuse, physical or psychiatric problems will be reimbursed in accordance with the provisions of the Group Insurance Program applicable to all eligible employees through Community Unit School District No. 9, Madison County. 116

7. Implementation of the policy will not require, or result in, any special regulations, privileges or exemptions from standard administrative practices or collective bargaining agreements. This program is not intended to supplant the normal disciplinary process, or in

any way block any union members legitimate access to the contractual grievance procedures.

SOURCE: Granite City Community Unit #9
Granite City, Illinois
DATE: 3/2/82

## SAMPLE

## P3045.00 EMPLOYEE ASSISTANCE PROGRAM

BOARD POLICY:

THE SCHOOL DISTRICT WILL CONTRACT WITH AN EXTERNAL AGENCY TO PROVIDE AN EMPLOYEE ASSISTANCE PROGRAM FOR ELIGIBLE EMPLOYEES OF THE SCHOOL DISTRICT AND THEIR FAMILIES.

*Administrative Implemental Procedures*

1. The cost of the employee assistance program shall be paid by the Board of Education and will not be part of the salary/benefit financial package for any employee group.
2. The employee assistance program will be offered to those employee groups whose representatives express specific written desire for and a willingness to commit themselves to the successful implementation of the program.
3. Eligible employees shall be those employees who are members of participating employee groups and who are permanently employed by the school district for 20 or more hours per week.
4. The Board will select an outside agency to provide the employee assistance program which meets the following criteria:
   a. The agency is prepared to perform assessment and referral functions for the full spectrum of employee problems.
   b. The agency is independent of any and all care providers.
   c. The agency has a record of success as viewed both by labor and management.
   d. The agency provides extensive inservice training for school district supervisors in making appropriate use of the employee assistance program.
5. Coordination of the program with the contracted agency shall be the responsibility of the Office of Risk Management and implementation of the program shall be the responsibility of the Personnel Services Division. The inservice component shall be coordinated through the Office of Staff Development.
6. Any eligible employee and/or family member may utilize the services of the employee assistance agency without cost to the employee. However, the agency may recommend that the employee seek assistance from a care provider at the employee's expense. The name of the employee and/or family member using the services shall be held in strictest confidence by the agency and in no case revealed to any employee of the school district by the agency.

7. Any school district supervisor who observes a decline in the work performance of any school district employee shall immediately contact an administrator in the Personnel Services Division. If circumstances indicate a need and the employee is eligible, the Personnel administrator may make a referral to the employee assistance agency.

8. In any case where an employee has been referred by a Personnel administrator to the employee assistance agency, the following procedures shall govern:

   a. Participation or nonparticipation in the employee assistance program shall be strictly voluntary on the part of the employee.

   b. If an employee chooses to participate, any disciplinary action which otherwise may have been taken against the employee for lack of effectiveness in the job will be held in abeyance for a reasonable period of time. Such period of time shall be determined by the Personnel Services Division administrator involved after consultation with the employee's supervisor and other appropriate persons.

   c. If the employee chooses not to accept such assistance, any disciplinary or administrative action which is taken must be justified exclusively by the employee's work effectiveness and not at all be based on the employee's choice to refuse assistance.

   d. School district personnel shall not request, nor expect, any detailed information about the nature of any employee's personal problems.

9. Participation or nonparticipation in the employee assistance program, as a result of either a self referral or a Personnel referral shall, in itself, have no bearing on any employee's status as an employee or affect career or promotional opportunities.

SOURCE: Wichita Unified School District #259
Wichita, Kansas
DATE: 10/82

## SAMPLE

## EMPLOYEE ASSISTANCE PROGRAM

*Applicability*

The Program is being offered to all salaried and hourly employees and their family members.

*Policy*

1. The general scope of the Program is to assure that any employee having a work hampering personal problem will receive careful consideration and an offer of confidential professional assistance.

2. It is recognized that many personal problems can be successfully identified and resolved, provided assistance is offered at an early stage and referral is made to an appropriate modality of care. This applies whether the problem is one of physical illness, mental or emotional illness, alcoholism, drug abuse, marital or family distress, financial or other concerns.

3. Procedures are designed to facilitate self referrals to the EAP. Information about the EAP can be obtained through management and union representatives.

4. Procedures are designed to assure no employee with personal problems will have either job security or promotional opportunities jeopardized because of a referral for diagnosis, counseling or treatment.

5. It shall be inappropriate for any BOCES personnel to diagnose employee personal problems; therefore the suggestion of self referral shall be based solely on work performance.

6. The decision to request and accept assistance through the Program is the personal choice of the individual.

7. Employees participating in the EAP will be expected to meet existing job performance standards and established work rules.

8. The records of the Employee Assistance Program will be maintained in the EAP office located at 750 James Street, Syracuse, New York. All records pertaining to the EAP will be treated with the degree of confidentiality accorded to medical records. EAP records will not be disclosed to anyone other than the employee, except under a court order compelling disclosure, or by a signed waiver by the employee granting permission for release of specific information.

9. Employees or family members seeking assistance will be able to do so with complete confidentiality.

10. Expenses incurred for diagnosis and treatment of personal problems will be reimbursed in accordance with provisions of the group insurance program applicable to all eligible salaried and hourly employees.

11. Implementation of this policy will not require, or result in any special regulations, privileges or exemptions from standard administrative practices or collective bargaining agreements. This Program is not intended to supplant the normal disciplinary process, or in any way block employees legitimate access to contractual grievance procedures.

12. A committee consisting of an equal number of Union and Management employees will be selected to develop and monitor the Employee Assistance Program and policy.

13. The following procedures are designed to facilitate referral to the Program:

    a. An employee or family member who desires confidential assistance for a personal problem should call 471-1361 and request the Employee Assistance Coordinator.

    b. The Employee Assistance Coordinator will provide necessary information or assistance over the telephone or will arrange an appointment for further confidential consultation at the EAP office.

    c. All contacts, verbal or written communications, or reports between the employee or family member and the EAP coordinator, will be held in strict confidence unless the employee or family member requests through a signed waiver, that the Employer or Union be notified.

SOURCE: BOCES Onondaga-Madison Counties
Syracuse, New York
DATE: 5/20/82

## APPENDIX K

## SAMPLE

## DISMISSAL OF TEACHERS

### REASONS FOR NONRENEWAL OR TERMINATION

The contract of employment of a teacher may be nonrenewed or terminated for any of the following reasons:

1. Inefficiency or incompetence.
2. Insubordination against reasonable rules of the Board of Education.
3. Moral misconduct.
4. Disability, as shown by competent medical evidence.
5. Elimination of the position to which the teacher was appointed, if no other position exists to which s/he may be appointed, if qualified.
6. Other due and sufficient cause.

### NONRENEWAL PROCEDURES

If the contract of employment of a probationary teacher is not to be renewed for a second or third year, the teacher will be notified in writing before March 1st of the school year that his/her contract is being considered for nonrenewal for the following year.

The following procedures will be followed in a nonrenewal:

1. Upon the teacher's written request, the board will send him/her a statement of the reasons for nonrenewal of the contract. This statement will be sent within five (5) days after the board receives the teacher's request.
2. Within ten (10) days of the receipt of this statement of reasons for nonrenewal, the teacher may do one of the following:
   a. Request in writing a hearing before an impartial hearing panel which will be appointed as follows:
      1) The board will appoint one panel member.
      2) The teacher will appoint one panel member.
      3) These two (2) members will choose a third who will act as chairman. The hearing will be held within fifteen (15) days of the receipt of the request. Within fifteen (15) days after the hearing, the panel will submit in writing its findings and a recommendation to the board as to the disposition of the

charges against the teacher. The panel will also send a copy of its findings and recommendations to the teacher.

4) The board will give the teacher concerned its written decision within fifteen (15) days of the receipt of the recommendations of the panel.

5) Each party will pay the fee of the panel member selected by it and will share equally the fee of the third panel member and all other costs incidental to the panel's hearing.

6) A copy of the transcript of the panel hearing will be furnished within fifteen (15) days of the board's decision, provided the teacher assumes the cost of the copy.

This process, which involves a hearing before an impartial hearing panel, will take place only if the board so designates.

This hearing will be public if the teacher requests it *or* if the board so designates it.

The teacher will have the right to be represented at the hearing by the party of his/her choice.

b. Request in writing a hearing before the Board of Education. This hearing will be public if the teachers so requests *or* if the board so designates it. The teacher will have the right to be represented at this hearing by the party of his/her choice.

The board will render its decision within fifteen (15) days of the hearing and will send a copy of its decision to the teacher.

A copy of the transcript of the board's hearing will be furnished to the teacher on his/her written request within fifteen (15) days of the board's decision, provided s/he assumes the cost of the copy.

**TERMINATION PROCEDURES**

Beginning with the fourth year of continuing employment, the contract of employment of a teacher will be renewed from year to year, except that it may be terminated at any time for any of the reasons listed above, provided that prior to terminating the contract the board gives the teacher written notice that termination of his/her contract is being considered. This notice will contain a statement of the reasons why termination is being considered.

When the teacher receives such notice, s/he may do *one* of the following:

1. Within twenty (20) days, file a written request for a hearing before an impartial hearing panel. This hearing will take place within fif-

teen (15) days of the receipt of the request even if the board does not so designate.

The panel for this hearing will be composed of three (3) members as described in the section on nonrenewal. The hearing will be conducted in that same manner as there described.

2. Within twenty (20) days, file a written request for a hearing before the board. This hearing will occur within fifteen (15) days of the receipt of the request and will follow the procedure described above.

**TEACHER SUSPENSION**

The board may, at any time, suspend without prejudice a teacher from duty immediately when serious misconduct is charged.

Legal Reference: CGS 10-151, 10-151a, PA 83-398

SOURCE: Hamden Public Schools
Hamden, Connecticut
DATE: January, 1968; April, 1972; November, 1976; Feb., 1983; January, 1985.

# SAMPLE

## PROFESSIONAL STAFF
## TERMINATION OF EMPLOYMENT
## (Administrators)

This policy sets forth procedures to be used by the board to nonrenew or immediately terminate the contract of a certified employee. These procedures are designed to protect the rights of both the employee and the board and to ensure that a spirit of fairness prevails.

*Procedures for nonrenewal of contract are as follows*:

A. When it becomes evident to the superintendent that an administrative employee is not doing an acceptable job, the superintendent will arrange a conference to discuss the problem and try to find a solution to it.

B. Within three days of the conference the superintendent will make a report in duplicate outlining the problems as seen by the superintendent and by the administrator, and the recommendations for resolving the problems. A copy of this report will be sent to the superintendent of schools.

C. Approximately two weeks after the first conference, a second conference will be held and a report made as outlined in (B) above.

D. At least two weeks and not more than four weeks after the second conference, a third conference will be arranged and a report made as outlined in (B) above.

E. If a solution to the problem is found after one or more meetings, the superintendent will notify the administrator in writing that his work is now satisfactory and further conferences are not necessary.

F After the third conference, if the problem has been resolved, the superintendent will notify the administrator in writing that his work is now satisfactory and further conferences are not necessary. If the problem still exists, the superintendent may schedule another conference or may recommend that the contract not be renewed. (This procedure is to ensure that there will be at least three formal conferences before a recommendation is made not to renew a contract. There may be any number of conferences before a problem is solved or a recommendation is made.)

G. In the event the superintendent decides to recommend to the board that an administrator's contract not be renewed he will notify the administrator of his action in writing.

H. After an administrator receives written notification of the superintendent's intention to recommend that this contract not be renewed,

he will have 10 days to file a written request with the president of the board, with a copy to the superintendent, for a hearing before the board.

The hearing before the board will be conducted in accordance with provisions outlined in Section 4, Act 74 of 190.

I. Within 10 days of the hearing the school board will render a final decision and the administrator will be notified in accordance with Section 80-1304 of the Arkansas statutes.

*Procedures for immediate termination of contract are as follows:*

A. Any person serving under annual contract may be placed on probation or suspended for cause with pay by the superintendent, who will report such action to the board at its next meeting for final action. Cause includes, but is not limited to, the following: immorality, conduct unbecoming a professional teacher, insubordination, failure to follow reasonable written regulations and policies, physical or mental disability impairing the performance of duties or any conditions which may require immediate action to protect the safety or welfare of the children.

B. While the board may terminate the employee's contract at any time for cause, such action will not take place prior to the employee's receipt of a notice of the specific charges and an opportunity for a hearing before the superintendent and the board in accordance with Arkansas school law.

SOURCE: Arkadelphia School District No. 1
Arkadelphia, Arkansas
DATE: 10/12/76

# SAMPLE

## SUSPENSION AND DISMISSAL OF PROFESSIONAL STAFF MEMBERS

The board will strive to assist personnel in every way possible to adjust to their positions and to perform their duties satisfactorily.

### *Nonrenewal of Contract*

Notice of the board's intention not to renew a probationary or continuing teacher's contract for the next school year will be served on the teacher on or before April 15 of the current contract year, as required by law. The notice will state the reasons for not renewing the contract.

### *Termination of Contract*

A. Suspension prior to dismissal

Upon a written statement of charges formulated by the board, charging a teacher of the district with cause for dismissal, the board may immediately suspend the teacher from his duties and give him notice of suspension.

The notice of suspension will be in writing and be served to the teacher personally or by registered mail addressed to the teacher at his last known address.

A teacher who is suspended will continue to be paid regular salary during the period of suspension.

B. Compulsory leave of absence

If any certificated teacher is charged by criminal complaint, information, or indictment with any criminal offense which would be deemed cause for dismissal, the board may immediately place the teacher on compulsory leave of absence for a period of time not exceeding 10 days after the date of the judgment in the proceedings.

Any teacher placed on compulsory leave of absence will continue to be paid regular salary during the period of compulsory leave of absence.

C. Dismissal

Upon a written statement of charges formulated by the board, charging that there exists cause for the dismissal of a continuing teacher of the district, the board will, except as otherwise provided by the laws of the state of Arizona, give notice to the continuing teacher of its intention to dismiss him 30 days from the day the notice was served.

Any written statement of charges alleging unprofessional conduct or incompetency will specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to

prepare a defense. It will, if applicable, state the statutes, rules or written objectives of the board which the teacher is alleged to have violated, and set forth the facts relevant to each occasion of alleged unprofessional conduct or incompetency.

The notice will be in writing and be served upon the teacher personally or by United States registered or certified mail addressed to him at his last known address. A copy of the charges, together with a copy of Arizona Revised Statutes 15-253, will be attached to the notice.

The teacher will have the right to a hearing if he files a written request with the board within 30 days of service of notice. The filing of a timely request will suspend the dismissal procedure pending completion of the hearing.

The board will not formulate any charge of incompetency against a continuing or probationary teacher unless, during the preceding semester or half school year prior to the date of the notice to the teacher of intention to dismiss and at least 90 days prior to the date of the notice, the board or its authorized representative has given the teacher written notice of incompetency, specifying the nature thereof and citing instances of behavior so that the teacher may have an opportunity to correct his faults and overcome the grounds for such charge. The written notice of intention to dismiss will include a copy of any evaluation pertinent to the charges made and filed with the board.

D. Hearings in cases of teacher dismissal

If a hearing is requested by the teacher, the hearing will commence within 30 days from the date of the filing of such request. The hearing will be conducted and a summary of findings made in accordance with the provisions of Section 41-785.

Upon request for a hearing, a commission will be authorized and members appointed thereto by the board to conduct the hearing. One member of the commission will be selected by the teacher, and one member will be selected by the board. The third member will be selected by these other two members, and will be chairman and a voting member of the commission. If either the board or the teacher for any reason fails to select a commission member within seven days of the filing of the request for a hearing, such failure will constitute a waiver of the right to selection, and the county school superintendent will immediately make a selection for the defaulting party. If the members selected by the board and teacher, or county school superintendent in the event of default of one or both of the parties, cannot agree within 10 days of their appointment on the selection of a third member, the third member of the commission will be selected by the State Personnel Commission.

The commission findings will be made by a majority vote of the commission and will be rendered by a written summary containing

findings of fact, determination of issues and a recommendation either that the teacher should be dismissed or that the teacher should not be dismissed.

The findings of the commission will be reviewed by the board which will render and, as appropriate, implement its decision.

The board will pay all expenses of the hearing. The teacher and the board will pay their own attorney and witness fees, except if the commission recommends that the teacher not be dismissed, the board will pay all reasonable attorney and witness fees incurred by the teacher.

Members of the commission will not be compensated but are eligible for reimbursement from the district of expenses as authorized for state employees under Title 38, Chapter 4, Article 2.

The board and the teacher have the right to be represented by counsel at any hearing under this section.

No witness will be permitted to testify at the hearing except upon oath or affirmation. No testimony will be given on evidence introduced relating to teaching competency which occurred more than four years prior to the date of the service of the notice. Evidence of records regularly kept by the board concerning the teacher may be introduced, but no decision relating to the dismissal or suspension of any teacher will be made based on charges or evidence relating to teacher competency occurring more than four years prior to service of the notice. The four-year time limit will not apply to the introduction of evidence in any area except that relating to competency.

If a continuing teacher has been suspended pending the hearing, he will be reinstated within five days after the board renders a decision not to dismiss.

The decision of the board may, on appeal of a continuing teacher, be reviewed by a court of competent jurisdiction in the same manner as the decision made in accordance with the provisions of Section 41-785. The proceeding will be set for hearing at the earliest possible date and will take precedence over all other cases, except older matters of the same character and matters to which special precedence is otherwise given by law.

SOURCE: Roosevelt School District 66
Phoenix, Arizona
DATE: Adopted prior to 1985

## SAMPLE

## FULLTIME CLASSIFIED PERSONNEL—4210

*Dismissal—4218*

The causes for and the procedures by which a fulltime classified employee shall be dismissed are those hereinafter stated.

*Provisions of Dismissal for Cause—4218.1a*

The provisions of dismissal for cause are the following:

*Disability-4218.1a.* If the employee suffers from mental or physical disability which continues beyond the permissive extended illness provisions (4241.4) of the Board sick leave policy and which renders him incapable of performing the service contemplated in his assignment, his employment may be terminated.

*Immoral or Reprehensible Conduct—4218.1b.* If the employee engages in immoral or reprehensible conduct prejudicial to the best interest of the Corpus Christi Independent School District, his employment shall be terminated at any time.

*Use of Controlled Substances and Alcohol—4218.1c.* If employees are found to be in possession of, and/or engaged in the illegal use of controlled substances, or found to be in possession of, and/or under the influence of alcohol while on duty, their employment shall be terminated.

*Incompetence or Neglect of Obligations—4218.1d.* If the employee becomes incompetent in performance of the service designated in his assignment, renders unsatisfactory service, becomes noncooperative, abandons his position during his established workday, neglects his duties, misuses his sick leave benefits, fails to notify without cause his designated supervisor when he is going to be absent, or fails to pay his debts, his employment may be terminated.

*Procedures Controlling Dismissal—4218.2*

Termination of employment of a fulltime classified employee shall be in accordance with prescribed administrative regulations and procedures governing dismissal.

*Suspension Without Pay—4218.3*

If the proposed action is to discharge the employee for any of the reasons stated in this policy, the employee may be suspended without pay by order of the Superintendent of Schools as provided in Board Policy 2112. If requested by the employee within 30 days of the incident, the Superintendent of Schools shall hold a hearing within fifteen (15) days.

SOURCE: Corpus Christi I.S.D.
Corpus Christi, Texas
DATE: Adopted prior to 1984

## APPENDIX L

## SUMMARY OF RECOMMENDATIONS FROM THE FINAL REPORT OF THE WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA, JUNE 1988

### RECOMMENDATIONS FOR EDUCATION

***Recommendation 1:*** Schools (from kindergarten through high school) and local boards of education must establish and enforce policies and procedures for students, teachers, administrators, and staff that clearly forbid the sale, distribution, possession, or use of all illicit drugs and alcohol on school property or at school-sponsored functions. Parents, students, and community officials should participate in developing and supporting these policies.

The following policies and procedures are recommended:

- Prohibiting the promotion, use or selling of any illegal substance (including alcohol, which is illegal for persons under the age of 21) at school, on school property, or at school-sponsored functions.
- Establishing and enforcing no use of tobacco rules for students.
- Developing a clear, strong, and consistent response for any violation.
- Reporting use or suspected use of drugs by students to parents and to law enforcement officials.
- Helping law enforcement officials get involved in identifying and resolving the problem.
- Using school or other facilities for student support groups such as Alcoholics Anonymous and Narcotics Anonymous.
- Enlisting the participation of students who are respected by their peers in school programs to prevent illegal drug use.
- Providing alternative education arrangements for students who are removed from school because of drug- or alcohol-related offenses.
- Ensuring that teachers, administrators, and other staff are neither abusers of alcohol nor users of illegal drugs.
- Providing a system of intervention and referral services for students, faculty, and other staff.
- Establishing methods to measure illicit drug and alcohol use among students at the school, and to evaluate the success of policies and procedures.

***Recommendation 2:*** Schools must be an active part of "community-wide" efforts to end the use of illegal drugs.

To this end, the schools should take the following actions:

- Coordinate communitywide efforts.
- Work to establish a sense of community pride in which all members of the community participate.
- Actively involve youth in community outreach programs for the aged, handicapped, or other service programs.
- Encourage local businesses to provide financial support for antidrug and antialcohol initiatives. Businesses should:
  —Actively monitor and discourage sales of alcohol and tobacco to underage clients;
  —Sponsor various academic, athletic, and cultural activities for teens;
  —Sponsor contests, scholarships, work-study programs, character building programs, and summer jobs for adolescents.
- Have gathering places for youth (i.e., school auditoriums and gymnasiums, community centers, or some analogous meeting place) and assure they are drug-free.
- Sponsor after-school and evening activities for adolescents.

***Recommendation 3:*** Schools must get parents actively involved in the prevention of drug and alcohol use.

***Recommendation 4:*** Chief State school officers and State boards of education must ensure that textbooks, curricula, and other materials on alcohol and drugs are accurate and current, that they clearly and consistently carry a "no use" message, and that they integrate education about illicit drugs and alcohol into the existing school curriculum from kindergarten through college.

***Recommendation 5:*** Colleges and universities must adopt firm, clear, and strongly enforced "no use" drug policies encompassing all members of the college community.

These policies should include the following:

- Clear prohibitions regarding the possession, use, or sale of illicit drugs by students, faculty, and other employees. For students under age 21 this prohibition would also apply to alcohol.
- Disciplinary measures for any infringement of these prohibitions.
- Procedures for reporting drug and alcohol use or sale by students, faculty, or staff.
- A special curriculum—dealing with the consequences and forms of drug use and responses to it—for persons preparing to become physicians, nurses, lawyers, social workers, teachers, ministers, and psychologists.

***Recommendation 6:*** Federal grant money to colleges and universities and for student loans should be contingent upon the institution's having and enforcing "no use" drug and alcohol policies.

***Recommendation 7:*** States should require all teachers to be knowledgeable about drugs and alcohol-related issues for teacher certification.

***Recommendation 8:*** Amend existing Federal legislation for drug education and prevention programs to assure accountability for results; in other words, tie in continued funding to a measurable decrease in drug and alcohol use.

***Recommendation 9:*** Funding for school-based drug prevention, education, and awareness efforts should be sustained over an extended period of time and should be contingent upon the effectiveness with which programs reach their stated goals.

## RECOMMENDATIONS FOR THE WORKPLACE

***Recommendation 1:*** Every private and public workplace must have a strong antidrug work policy that covers every employee. Federal, state and local governments should encourage such policies.

The elements that make up a comprehensive, anti-drug-use work policy are as follows. (These elements reflect minimum guidelines; individual business or industry requirements may be stonger).

- Prohibit the use, possession, and distribution of an illicit drug by employees, whether on or off the job.
- Include preemployment, "for cause," and random drug testing where necessary.
- Provide for employee drug education, prevention, and public awareness programs.
- Include an employee rehabilitation program.
- Guarantee confidentiality to the fullest extent possible.
- Specify the consequences for illicit drug use, up to and including dismissal for employees who do not adhere to the antidrug policy.
- Establish training programs for supervisors to identify employees showing behavioral and physiological evidence of drug use.
- Establish data collection and recordkeeping procedures to assess the effectiveness of the antidrug policy.

***Recommendation 2:*** Labor unions and employee associations must promote a drug-free life-style among their membership and in their communities.

***Recommendation 3:*** The Small Business Administration, with the support of other appropriate Federal agencies and private organizations,

must help small businesses adopt and implement drug-free workplace policies.

***Recommendation 4:*** The Secretary of Commerce should direct an effort by business and trade associations to work together and with the community to promote a drug-free workplace.

***Recommendation 5:*** Workplace liability and health insurance and worker's compensation carriers should consider offering reduced premiums, associated with the reduced risk, for companies adopting antidrug policies and programs.

***Recommendation 6:*** Any comprehensive health insurance plan should make available coverage for illegal drug use treatment and rehabilitation programs.

# APPENDIX M

## STATE LAWS REGULATING DRUG TESTING OF EMPLOYEES*

**CONNECTICUT**—P.L. 87-55 (enacted July 5, 1987). Specifies test procedures and restricts testing of employees as follows:

*Sec. 6.* No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.

*Sec. 7.* Notwithstanding the provisions of section 6 of this act, an employer may require an employee to submit to a urinalysis drug test on a random basis if (1) such test is authorized under federal law, (2) the employee serves in an occupation which has been designated as a high-risk or safety-sensitive occupation pursuant to regulations adopted by the commissioner of labor pursuant to chapter 54 of the general statutes, or (3) the urinalysis is conducted as part of an employee assistance program sponsored or authorized by the employer in which the employee voluntarily participates.

*Sec. 8.* Nothing in this act shall prevent an employer from conducting medical screenings, with the express written consent of the employees, to monitor exposure to toxic or other unhealthy substances in the workplace or in the performance of their job responsibilities. Any such screenings or tests shall be limited to the specific substances expressly identified in the employee consent form.

*Sec. 9.* Nothing in this act shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours, or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

**IOWA**—H.F. 469 (enacted June 5, 1987):

3. This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

   A. The employer has probable cause to believe that an employee's faculties are impaired on the job.

   B. The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer.

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* **The EEAC reports that in 1988 at least three states, Kansas, Maryland and Nebraska, have enacted laws relating to drug testing of employees.**

C. The test sample withdrawn from the employee is analyzed by a laboratory or testing facility that has been approved under rules adopted by the department of public health.

* * *

An employer shall take no disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation . . .

**MINNESOTA**—Ch. No. 388 (enacted June 3, 1987)

*Subd. 2.* [Job Applicant Testing.] An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, . . . the employer shall inform the job applicant of the reason for its action.

*Subd. 3.* [Routine Physical Examination Testing.] An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

*Subd. 4.* [Random Testing.] An employer may request or require only employees in safety-sensitive positions to undergo drug and alcohol testing on a random selection basis.

*Subd. 5.* [Reasonable Suspicion Testing.] An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

(1) is under the influence of drugs or alcohol;

(2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;

(3) has sustained a personal injury, . . . or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

*Subd. 6.* [Treatment Program Testing.] An employer may request or require an employee to undergo drug and alcohol testing if the employee

has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

**MONTANA**—Senate Bill 338 (enacted April 15, 1987).

Employers prohibited from requiring:

(b) as a condition for employment, any person to submit to a blood or urine test, except for employment in hazardous work environments or in jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; and

(c) as a condition for continuation of employment, any employee to submit to a blood or urine test unless the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use.

**RHODE ISLAND**—Ch. 540 (enacted July 1, 1987) Civil and criminal penalties for violations.

No employer or agent of any employer shall, either orally or in writing, request, require or subject any employee to submit a sample of his urine, blood or other bodily fluid or tissue for testing as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to such testing if:

(A) the employer has reasonable grounds to believe based on specific objective facts, that the employee's use of controlled substances is impairing his ability to perform his job; and

(B) the employer provides the test sample in private, outside the presence of any person; and

(C) the testing is conducted in conjunction with a bona fide rehabilitation program; and

(D) positive tests are confirmed by means of gas chromatography mass spectrometry or technology recognized as being at least as scientifically accurate; and

(E) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by an independent testing facility and so advises the employee; and

(F) the employer provides the employee with a reasonable opportunity to rebut or explain the results.

**UTAH**—House Bill 145 (enacted March 17, 1987).

Specifies procedural safeguards. Requires employer to have written policy before testing. Testing allowed for:

(a) investigation of possible individual employee impairment;

(b) investigation of accidents in the workplace or incidents or workplace theft;

(c) maintenance of safety for employees or the general public; or

(d) maintenance of productivity, quality of products or services, or security of property or information.

Employer can suspend, terminate, discipline or require enrollment in rehabilitation program for any employee with confirmed positive result or who refuses to submit to testing. Prevents employees from bringing suit for defamation, libel, slander, damage to reputation and handicap discrimination.

**VERMONT**—House Bill 39 (enacted May 22, 1987).

Applicants can be tested with 10 day notice and conditional offer of employment. Testing of current employees restricted as follows:

(c) Exception. Notwithstanding the prohibition in subsection (a) of this section, an employer may require an individual employee to submit to a drug test if all the following conditions are met:

(1) Probable cause. The employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job.

(2) Employee assistance program. The employer has available for the employee tested a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.

(3) Employee may not be terminated. The employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the employee assistance program; however, the employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with subdivisions (1) and (4) of this subsection and the test result is positive.

## LAWS AFFECTING DRUG TESTING

**CALIFORNIA**—Ch. 506. Private employers with 25 or more employers must "reasonably accommodate" any employee who wishes to enter a drug or alcohol rehabilitation program unless to do so would cause "undue hardship" to employer.

**LOUISIANA**—Act No. 464. In order to defend unemployment compensation claim by employee fired for drug use, employer must have substance abuse policy.

D. Within the terms of the policy, an employer may require the collection and testing samples for the following purposes:

(1) investigation of possible individual employee impairment;

(2) investigation of accidents in the workplace or incidents of workplace theft;

(3) Maintenance of safety for employees or the general public; or security of property or information.

(4) Maintenance of productivity, quality of products or services, or security of property or information.

Requires employer to use state-licensed laboratories, follow specific testing procedures and keep confidential all information received through drug testing program.

**NORTH CAROLINA**—House 1 "ratified" August 14, 1987. Establishes Workplace Drug Testing Study Commission to report to Assembly by 1989 with recommendations on "procedures or regulations for the administration of drug tests by employers . . ."

**OREGON**—Senate Bill 478 (enacted July 16, 1987). Does not regulate employers but rather requires licensing of drug testing laboratories.

*Section 2.* (1) In addition to duties which a clinical laboratory may perform under this chapter, a laboratory is authorized to perform appropriate tests, examinations or analyses on materials derived from the human body for the purpose of detecting substances of abuse in the body. All laboratories performing the tests, examinations or analyses must be licensed under the provisions of this chapter and must employ qualified technical personnel to perform the tests, examination and analyses . . .

(3) When the specimen of a person tested for substance abuse is submitted to the laboratory and the test result is positive, the laboratory shall perform a confirming test which has been designated by rule of the Health Division as the best available technology for use to determine whether or not the substance of abuse identified by the first test is present in the specimen prior to reporting the test results. . . .

(5) If an initial test shows a result indicating the presence of a substance of abuse in the body, any confirmatory test the results of which are

to be used to deprive or deny any person any employment or any benefit must be conducted in a licensed clinical laboratory.

(6) If any test for substances of abuse is performed outside this state the results of which are to be used to deprive or deny any person any employment or any benefit, the person desiring to use the test shall have the burden to show that the testing procedure used meets or exceeds the testing standards of this state.

SOURCE: Equal Employment Advisory Commission
Washington, D.C.
DATE: January 1988

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